IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1960

412

COURIER JOURNAL & LOUISVILLE TIMES COMPANY, Petitioner

vs.

HON. CURTIS Judge Jefferson Circuit Court Criminal Branch Second Division Jefferson County, Kentucky, and JAMES M. YODER Official Court Stenographer Jefferson Circuit Court Criminal Branch Second Division Jefferson County, Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

WILSON W. WYATT
NORTH R. WOLFORD
EDGAR A. ZINGMAN

INDEX.

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	2
The Constitution Section Involved	2
Statement	3
How Federal Question Is Presented	6
Reasons for Granting the Writ	6
Conclusion	8

Appendix:

	Appendix Page
Appendix A. Constitution Section	1
Appendix B.	
1. Petition for a Writ of Mandamus	1–6
2. Affidavit of Edgar A. Zingman	6–10
3. Affidavit of John H. Amon	10–12
4. Response to Petition For Writ of Mandamus	13–15
5. Affidavit of James R. Bowles	16
6. Opinion of the Court by Judge Bird	17–21
7. Concurring Opinion by Judge Milliken	22–24
8. Dissenting Opinion of Judge Stewart	25–35
Appendix C.	
1. Petition for Rehearing	1–84
2. Order overruling Petition for rehearing	85

CITATIONS.

	PAGE
Courier-Journal & Louisville Times Co., v. *Curtis et al.*, Ky., 335 S. W. 2d 934 (1960)	1
28 U. S. C. 1257 (3)	2
Constitution of the United States, 14th Amendment	2
In re Oliver, 333 U. S. 257 (1948)	7
Craig v. *Harney*, 331 U. S. 367 (1946)	7
Maryland v. *Baltimore Radio Show*, 338 U. S. 912 (1949)	7
Grosjean v. *American Press Co.*, 297 U. S. 233 (1936)	8

IN THE

Supreme Court of the United States

October Term, 1960

No. _____

COURIER-JOURNAL & LOUISVILLE TIMES COMPANY, - - - - - - - - *Petitioner,*

v.

L. R. CURTIS, Judge, Jefferson Circuit Court, Criminal Branch, Second Division, Jefferson County, Kentucky and JAMES M. YODER, Official Court Stenographer, Jefferson Circuit Court, Criminal Branch, Second Division, Jefferson County, Kentucky, - - - - - - - - *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the COURT OF APPEALS OF KENTUCKY; entered in the above entitled case on May 22, 1959, and overruling a Petition for Rehearing on June 24, 1960.

CITATIONS TO OPINIONS BELOW.

The Opinions of the COURT OF APPEALS OF KENTUCKY (R. 25-30), the Concurring Opinion (R. 31-34) and the Dissenting Opinion (R. 35-43), are printed in Appendix B hereto, *infra,* Appendix B, pp. 17-35, are reported in 335 S. W. 2d 934.

JURISDICTION.

The judgment of the COURT OF APPEALS OF KENTUCKY was entered on May 22, 1959. (R. 24; Appendix B, pp. 17-35, *infra*).

A timely Petition for Rehearing filed October 23, 1959 (R. 48) Appendix C, pp. 1-84, *infra*) was denied on June 24, 1960 (R. 52; Appendix C, p. 85, *infra*). The jurisdiction of this Court is invoked under 28 U. S. C. 1257 (3), since denial of title, right and privilege under the Constitution of the United States is claimed by Petitioner.

QUESTION PRESENTED.

Can the sole evidence upon which a State Court set aside a conviction and death sentence for two heinous and brutal murders be kept secret by that State Court in violation of the public right in public trials and the freedom of the press guaranteed by the Fourteenth Amendment?

THE CONSTITUTION SECTION INVOLVED.

The section of the United States Constitution involved is the Fourteenth Amendment. Its provisions are printed in Appendix A. (Appendix A, p. 1, *infra*.)

STATEMENT.

On New Year's Eve 1957, an elderly Louisville couple were cruelly and brutally beaten to death (R. 2). The brutal nature of the case aroused widespread community fears and interest. Subsequently, one William F. Owen, a youth of sub-normal mentality, was tried, convicted and sentenced to death for each of the murders (R. 2, 15, 16, 48 at 3; Pet. for Rehearing, App. C, p. 3, *infra*). On January 12, 1959, each of these convictions came for review before the trial court on Motions for a New Trial timely filed. At that time, in open court, counsel for Owen advised the court that Owen wished to have a conference in chambers. The Respondents, Curtis and Yoder, Judge and Official Court Stenographer respectively, Counsel for Owens, and the Commonwealth and members of the press then left the courtroom and entered the chambers. There, Owen advised the court that he would not make a statement in the presence of representatives of the press since he did not wish them to publish it. The Respondent, Curtis, advised Owen that any statement Owen made would become a public record and as such would be available to the press for publication. After this statement, members of the press withdrew from the chambers without protest and Owen proceeded to make a confession which was stenographically recorded by the Respondent, Yoder. (R. 2, 15, 16, 48 at 3; Pet. for Rehearing, App. C, p. 3, *infra*.)

Immediately thereafter all parties returned to the Courtroom. The Respondent, Curtis, announced that

the Motions for a New Trial had been sustained and a jury was impaneled. (R. 2, 15, 16, 48 at 3; Pet. for Rehearing, App. C, p. 3, *infra*). Owen then changed his previous plea of not guilty to guilty and the Assistant Commonwealth Attorney then made a statement to the jury. In that statement he referred to a "confession" made by Owen in chambers (without revealing its contents) and requested the jury to now return a verdict of guilty with the imposition of a life sentence. (Under Kentucky proceedings juries fix the sentence in capital cases). The procedure was then repeated in the second case and the Respondent Curtis then entered a life sentence in each case to be served concurrently. (R. 2, 15, 16, 48 at 3; App. C, p. 3).

Immediately thereafter members of the press unsuccessfully sought copies of the "confession" which was the basis for the change in Owen's fortunes and which had been referred to by the Assistant Commonwealth's Attorney. (R. 2, 7, 48 at 10; Pet. for Rehearing, App. C, p. 10, *infra.*)

Subsequently, on repeated occasions the Respondent, Curtis, advised Petitioner's representatives and employees that the "confession" was a public record which they had a right to read, copy and publish, but denied petitioner and its employees the opportunity to exercise this right. (R. 3, 8, 9, 10, 15, 16, 17, 48 at 3, 4; App. C, pp. 3, 4).

Thereafter, Petitioner brought an Original Proceeding in the Court of Appeals of Kentucky petitioning for a Writ of Mandamus requiring the Respondents, Curtis and Yoder, to furnish Petitioner a com-

plete and accurate transcript of the confession of William Floyd Owen. (R. 1-5, App. B, pp. 1-12, *infra.*) The Petition alleged that the confession was an admitted public record and that denial of opportunity to examine and publish it was a violation of the First and Fourteenth Amendments to the Constitution of the United States of America and of various sections of the Constitution of Kentucky (R. 3, 4, App. B, p. 4, *infra*). A response to the Petition was made denying the allegations of the Petition. (R. 12, 13, 14; App. B, pp. 13-16, *infra.*)

On May 22, 1959, after oral argument and briefing, the Court of Appeals of Kentucky rendered its Opinion denying the Writ. (R. 24, App. B, pp. 17-21, *infra.*) The Opinion summarily disposed of Petitioner's First Amendment claims (R. 26, App. B, p. 18, *infra*), and ignored the other Constitutional questions (R. 25-30; App. B, pp. 18-21, *infra*). A dissenting opinion (R. 35-43; App. B, pp. 25-35, *infra*), would have granted the Writ. This Opinion recognizes the right of public trial asserted by Petitioner, but does not specifically refer to Constitutional provisions in support thereof.

Thereafter, a timely Petition for Rehearing was filed and briefed by the parties. (R. 48, 51; App. C, pp. 1-84, *infra*). On June 24, 1960, the Petition for Rehearing was denied without an Opinion by the Court. (R. 52; App. C, p. 85, *infra.*)

HOW FEDERAL QUESTION IS PRESENTED.

These proceedings were begun as a Petition for a Writ of Mandamus brought directly in the Court of Appeals of Kentucky (R. 1; *infra* App. B, pp. 1-6). At the very outset the federal questions were specifically raised as the major basis for the exercise of the Writ (R. 3; *infra* App. B, p. 4). Subsequently, in its Petition for Rehearing (R. 48; App. C, pp. 1-85, *infra*) this Petitioner specifically called to the attention of the Court of Appeals of Kentucky the fact that the federal questions had been posed from the outset and asked that court to pass on these questions. (R. 48 at 2, 4, 6; *infra* App. C, pp. 2, 4, 6).

REASONS FOR GRANTING THE WRIT.

This case presents a clear conflict with the firmly established constitutional rights of a public trial and freedom of the press.

If the action of the Kentucky Court of Appeals is undisturbed it means that, in Kentucky at least, essential steps in the administration of criminal law may be hidden from the public. Here, in a case involving the most serious offense against public morality and community mores we are asked to accept a result based upon standards and information which are kept secret from us. Not only has an individual of subnormal mentality received two life terms of imprisonment, but the community itself is faced with an inexplicable shift from death sentences arrived at by a jury

after a public open trial, to life sentences [which in Kentucky can mean freedom after eight years] imposed on the basis of secret proceedings in chambers.

The judicial process cannot long survive when such proceedings are the basis for the administration of justice. This Court has repeatedly stated the importance of public attendance upon a criminal trial and has expressed this in terms of the constitutional guarantees of the public right to a public trial and of freedom of the press. The instant case will give this Court an opportunity to restate these important principles in a context not previously presented and in a manner to clearly establish the public right in a public trial.

1. The decision of the Court below in the instant case is directly in conflict with the doctrines of the public right in the constitutional guarantee of a public trial announced by this Court in *In re Oliver*, 333 U. S. 257 (1948), *Craig* v. *Harney*, 331 U. S. 367 (1946), and *Maryland* v. *Baltimore Radio Show*, 338 U. S. 912 (1949).

In those cases this Court stated that a public trial is required of State Courts by the due process clause of the Fourteenth Amendment and that one of the safeguards of this right is the right of the public to know what goes on in its Courts. (R. 48 at 70 & 71; *infra*, App. C, pp. 70, 71).

The proceeding sanctioned by The Court of Appeals of Kentucky in this case is the absolute antithesis of these requirements and unless reversed by this Court can only lead to the growth of public distrust of the judicial process.

2. The decision of the Court below in the instant case is directly in conflict with decisions of this Court on the right of freedom of the press as set forth in *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936) and *Craig* v. *Harney*, 331 U. S. 367 at 374 (1946).

In these cases this Court pointed out the importance to the operation of democratic government of an informed society resulting from a free press. (R. 48 at 76-80; *infra*, App. C, pp. 76-80).

These points are fully developed with citation of relevant authorities in the Petition for Rehearing filed in the Court of Appeals of Kentucky. For the convenience of this Court, the Petition for Rehearing is printed in its entirety in the Appendix herein. (*Infra*, App. C, 1-84). Particular attention is directed to the authorities and argument set out under points E and F at pages 64-80 of the Petition for Rehearing, *infra*.

CONCLUSION.

For the foregoing reasons, because of the importance of this question to the sound administration of justice, and because of the fundamental issues of public trial and freedom of the press involved, this Petition for a Writ of Certiorari should be granted. Failure to grant the Petition will allow a trial judge to make a mockery of the right to a public trial and to act as the absolute censor of what portions of the record of a trial shall be subject to review by the press and public. This is particularly loathsome where, as here, no justification is offered for the censorship other than

the exercise of a particular judge's discretion. Such a condition is clearly interdicted by the Constitution and should be subjected to the salutary safeguards of review, analysis and ruling which can only be accomplished by granting the Writ of Certiorari.

Respectfully submitted,

WILSON W. WYATT,
300 Marion E. Taylor Bldg.,
Louisville 2, Kentucky,

ARTHUR W. GRAFTON,
300 Marion E. Taylor Bldg.,
Louisville 2, Kentucky,

EDGAR A. ZINGMAN,
300 Marion E. Taylor Bldg.,
Louisville 2, Kentucky,
Counsel for Petitioner.

September 19, 1960.

APPENDIX A.

Appendix A Page

Fourteenth Amendment to the Constitution of the United States (Section 1)..... 1

APPENDIX B.

Appendix B Page

Petition for a Writ of Mandamus..... 1- 6

Affidavit of Edgar A. Zingman..... 6-10

Affidavit of John H. Amon.....10-12

Response to Petition for Writ of Mandamus.....13-15

Affidavit of James R. Bowles..... 16

Opinion of the Court by Judge Bird.....17-21

Concurring Opinion by Judge Milliken.....22-24

Dissenting Opinion by Judge Stewart.....25-35

APPENDIX C.

Appendix C Page

Petition for Rehearing..... 1-84

Order Overruling..... 85

APPENDIX A

APPENDIX A.

Fourteenth Amendment to the Constitution of the United States, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX B

IN THE

COURT OF APPEALS OF KENTUCKY

Original No. W-23-59.

COURIER-JOURNAL & LOUISVILLE TIMES COMPANY (a Kentucky corporation), 525 West Broadway, Louisville, Kentucky, - - - - *Petitioner,*

v.

L. R. CURTIS,
Judge, Jefferson Circuit Court,
Criminal Branch, Second Division,
Jefferson County Court House,
Louisville, Kentucky,

and

JAMES M. YODER,
Official Court Stenographer,
Jefferson Circuit Court,
Criminal Branch, Second Division,
Kenyon Building,
Louisville, Kentucky, - - - - - *Respondents.*

PETITION FOR A WRIT OF MANDAMUS.

Comes now the Courier-Journal & Louisville Times Company, by counsel, pursuant to RCA 1.420 and CR 81 and for its petition for a writ of mandamus states as follows:

(1) The Respondents against whom relief is sought are:

(a) L. R. Curtis, Judge, Jefferson Circuit Court
Criminal Branch, Second Division,
Jefferson County Court House,
Louisville, Kentucky

(b) James M. Yoder, Official Court Stenographer,
Jefferson Circuit Court, Criminal Branch,
Second Division,
Kenyon Building,
Louisville, Kentucky

(2) The facts entitling Petitioner to relief are:

(a) The Petitioner is a corporation engaged in the business of publishing newspapers in Jefferson County Kentucky for distribution and sale in Jefferson County, Kentucky, throughout the State of Kentucky and in various places in the United States.

(b) As publisher of newspapers the Petitioner has a special and qualified interest in judicial and public records so as to entitle agents, servants or employees of the Petitioner to access to those records and to copy such records for purposes of publication and otherwise furnishing news concerning judicial proceedings to the members of the reading public.

(c) On January 12, 1959, proceedings were held on a motion for a new trial in Criminal Actions Nos. 109577 and 109578, Commonwealth of Kentucky v. William Floyd Owen, in the Jefferson Circuit Court, Criminal Branch, 2nd Division, Judge L. R. Curtis presiding. In May of 1958, the defendant had been tried to a jury for the crime of murder in one of the above actions and upon being found guilty by the jury had received a death sentence. Shortly after the onset of the proceedings on January 12, 1959, counsel for the defendant requested a conference in the chambers of the Court. The Judge, counsel, the official court stenographer, James M. Yoder, the defendant and members of the press then adjourned to the Court's chambers.

In chambers counsel for the defendant advised the Court that the defendant desired to change his plea from not guilty to guilty and wished to make a statement. The defendant then advised the Court that he would not make his statement in the presence of the press since he did not wish them to publish it. The Court instructed the defendant that any statement he

made would become a public record and as such would be accessible to the press for publication. Upon receipt of this statement the members of the press then left the Court's chambers and the defendant proceeded to make his confession which was stenographically transcribed by the official court reporter.

(d) Subsequently, all of the parties returned to the court room and a jury was empanelled. In open court the defendant announced that he was pleading guilty to the charge of murder and the Assistant Commonwealth's Attorney then advised the jury that the defendant had made a full confession in the Court's chambers and that on the basis of that confession the Commonwealth was recommending that the jury return a verdict of guilty and a sentence of life imprisonment for each of the murders charged. In each case the jury followed these instructions.

(e) Subsequent to the conclusion of these proceedings agents, servants and representatives of the Petitioner attempted to secure from the official court reporter, at the Petitioner's cost, a copy of the defendant's statement.

(f) The Respondent, James M. Yoder, refused and still refuses to furnish the Petitioner, its agents, servants or employees a copy of the defendant's statement unless directed to do so by Judge Curtis.

(g) Subsequent to the conclusion of the proceedings the Petitioner and its representatives have attempted to secure from the Respondent, Judge L. R. Curtis, an order directing the Respondent, James M. Yoder, to furnish the Petitioner, at Petitioner's cost, a copy of the statement or to allow Petitioner to have its agents, servants or employees, if possible, make a copy of the statement.

(h) The Respondent, Judge L. R. Curtis, has refused and still refuses to permit the Petitioner or its agents, servants or employees to inspect or read the notes of the Respondent, James M. Yoder, or in any manner to obtain a copy of the defendant's statement taken by the Respondent, James M. Yoder.

(3) The confession made by the defendant, William Floyd Owen, in the foregoing proceedings is a material and essential part of those proceedings, was referred to in open court by the Commonwealth's Attorney, as the basis for the recommended change from a death sentence to a life sentence with possibilities of probation within a period of eight years. These matters occurred in the course of proceedings growing out of two brutal murders which were and are of great public interest and concern to the people of Louisville and Jefferson County, Kentucky, and the substance of the confession is most significant and important and as of right should be available to news media and members of the general public in view of the highly unusual and questionable proceedings in this matter.

(4) The denial to members of the press of the opportunity to obtain and publish in full the substance of the defendant's confession which is, concedely a public record, is a violation of the provisions, clear intent and purpose of the First and Fourteenth Amendments to the Constitution of the United States of America in that it constitutes an infringement of freedom of the press and a violation of due process of law and is a violation of the provisions of Sections 2, 8, 11 and 26 of the Constitution of Kentucky, in that it is an exercise of absolute and arbitrary power, a violation of freedom of the press, a denial of the obligation of a public trial and an attempt to subordinate the Bill of Rights of the Constitution of Kentucky to the exercise of arbitrary power by a judicial officer. It is further a violation of the clear intent and purport of KRS 28.430 to require that proceedings in criminal actions be available for members of the general public having a legitimate interest therein such as the interest of the Petitioner.

(5) The nature of the relief sought:

Wherefore, the Petitioner, by counsel, respectfully prays that a writ of mandamus issue requiring that:

(a) The Respondent, Judge L. R. Curtis, be directed to order the Respondent, James M. Yoder, to furnish

the Petitioner, at Petitioner's cost, a complete and accurate transcript of the confession of the defendant, William Floyd Owen, given on January 12, 1959, in the chambers of the Jefferson Circuit Court, Criminal Branch, Second Division, in Actions Nos. 109577 and 109578 in the above court.

(b) Pursuant to the provisions of RCA 1.420(c) the Respondent, James M. Yoder, immediately, accurately and completely transcribe his notes of the confession of the defendant, William Floyd Owen, in the chambers of the Jefferson Circuit Court, Criminal Branch, Second Division, on January 12, 1959, in Actions Nos. 109577 and 109578 in the above Court and to forthwith deposit such transcript and the original stenographic notes from which said transcript was made with the Clerk of the Jefferson Circuit Court for safe keeping pending a final determination of this matter, the Petitioner agreeing to post with this Court or the Clerk of the Jefferson Circuit Court its check for the reasonable cost of such transcript.

(c) The entire matter be set down for hearing not later than Monday, January 19, 1959, pursuant to the provisions of RCA 1.420(c) rather than at any later date because the news value and interest of the Petitioner and the general public is immediately and will be completely and totally destroyed by any delay or protracted extension of these proceedings.

(d) All other necessary and proper relief.

Wyatt, Grafton & Grafton,
300 Marion E. Taylor Building,
Louisville 2, Kentucky,
Juniper 2-1881,

(s) Edgar A. Zingman,
Counsel for Petitioner.

Courier-Journal & Louisville
Times Company,

By (s) Lawrence Long,
Secy. & Treas.

Before me, a Notary Public in and for the Commonwealth and County aforesaid, personally appeared Lawrence Long, the Secretary-Treasurer of Courier-Journal & Louisville Times Company, this 14th day of January, 1959, and stated that he has read the foregoing Petition, that it is true to the best of his information, knowledge and belief and that he has signed said Petition on behalf of the Courier-Journal & Louisville Times Company as the duly authorized officer thereof.

My commission expires April 5, 1959.

(s) Edgar A. Zingman,
Notary Public, Jefferson County
Kentucky.

I certify that a copy of the foregoing Petition for a writ of mandamus was personally delivered this 14th day of January, 1959, to each of the Respondents.

(s) Edgar A. Zingman.

AFFIDAVIT.

Commonwealth of Kentucky }
County of Jefferson } ss

Edgar A. Zingman, being first duly sworn, deposes and states as follows:

My name is Edgar A. Zingman and I am a resident of Louisville, Jefferson County, Kentucky. I am a member of the Bar of the State of Kentucky and associated with the firm of Wyatt, Grafton & Grafton in Louisville, Kentucky, in the practice of law.

The firm of Wyatt, Grafton & Grafton are counsel for the Courier-Journal & Louisville Times Company, publishers of the Courier-Journal and the Louisville Times.

On Monday, January 12, 1959, I was advised by the above client that a confession or statement had been made by the defendant, William Floyd Owen in the chambers of

Judge L. R. Curtis, Judge of the Jefferson Circuit Court, Criminal Branch, Second Division. This statement was reportedly made at the proceedings in Actions Nos. 109577 and 109578 in the above Court. I was further advised that the defendant had asked that members of the press, radio and television news media be excluded from the Judge's chambers during the statement since he did not want them to print them. It was reported to me that Judge Curtis stated to the defendant in response to this request that any statement the defendant made would become a public record and would be available to members of the press. I was informed that members of the press left the Judge's chambers and that subsequently the Judge, counsel, the defendant and the court reporter returned to the court room where a jury was empanelled and advised by the Assistant Commonwealth's Attorney, Laurence E. Higgins, that the defendant had confessed and had changed his plea from not guilty of the murders charged to guilty.

My clients inform me that after the jury returned its verdict on the plea of guilty, employees of the newspaper attempted to secure from James M. Yoder, the official court stenographer, a copy of the statement made by the defendant in chambers. I was advised that Mr. Yoder stated he would not make such a copy available unless the Judge directed and that the Court subsequently refused to direct him to make a copy available or to allow him to make a copy available.

Upon receipt of the foregoing information I personally contacted James Yoder and requested of him that he furnish a copy of the statement at my client's cost. Mr. Yoder advised me that he was unable to furnish my clients a copy of the statement unless the Judge ordered him to do so but that he would check further with the Judge on this matter. I then contacted Frank Haddad, one of counsel for the defendant, and was advised by him that he had no personal objection to my clients obtaining a copy of the statement, that he felt that it was a public record available to

them, but that inasmuch as his client had requested that it not be made available to the press he did not feel that he could authorize a copy being furnished to the press consistent with his obligations to his client. After this conversation I again contacted James Yoder and was advised by him that Judge Curtis had directed him not to furnish a copy of the statement to the press and not to read his stenographic notes to representatives of the press. However, he stated that Judge Curtis had instructed him that if my clients had an employee who was able to read the stenographic notes it would be permissible for such an employee to come to Yoder's office and read the notes inasmuch as the statement made by the defendant constituted a public record. I advised Mr. Yoder that we would employ the services of such a person to attempt to read Mr. Yoder's stenographic notes and made an appointment for this purpose. Subsequently, I was advised by the stenographic reporter I had employed that he was unable to read Mr. Yoder's notes. I then personally contacted Judge Curtis and explained to him that we believed that the statement constituted a public record and that we had understood that he had so held. Judge Curtis confirmed to me that he did believe the statement was a public record and that he had so advised the defendant. I then advised Judge Curtis that as a practical matter the statement was not being made available to the press and would not be available to the press unless he permitted or directed Mr. Yoder to furnish the press a copy and that in view of our agreement that the statement constituted a public record I could not understand his refusal to permit Mr. Yoder to furnish us with a copy.

Judge Curtis advised me that under the provisions of KRS 28.430 he did not believe that a stenographic transcript of proceedings in a criminal action could be ordered or obtained unless one of the parties to the action requested it. Further, he stated that inasmuch as the defendant had made the statement only upon the express condition that the

press be excluded, the Judge felt that he had a moral obligation not to order a transcript of the statement to be furnished to the press. He stated that he did not believe it inconsistent with this to allow the press to read the notes of the statement if they had someone who could interpret the notes, but that he was not going to allow the reporter himself to read or transcribe the notes. I again pointed out to the Judge that as a practical matter this meant that he was denying us access to what he constituted to be a public record. The Judge, however, persisted in his ruling.

I then contacted Marion D. Odle, Official Court Reporter in the United States District Court at Louisville, Kentucky, and arranged for him to attempt to read Mr. Yoder's notes. I then advised Mr. Yoder of this arrangement and it was agreed that Mr. Odle would meet with me in Mr. Yoder's office at 9:00 A.M., C.S.T., on Tuesday, January 13, 1959, for the purpose of attempting to read the notes.

Later Monday afternoon, January 12, 1959, I received a telephone call from Mr. Odle in which he advised me that Mr. Yoder had called him and stated that there would be no purpose in Mr. Odle coming to Mr. Yoder's office because Judge Curtis had ruled that Mr. Yoder's notes should not be made available for reading by any agent or representative of the press.

On Tuesday morning, January 13, 1959, I received a telephone call from Mr. Yoder and was informed by him that Judge Curtis had directed that he not permit his notes to be read or transcribed by any representative or agent of the press and that he, Yoder, not read or transcribe the notes for any representative of the press. He further advised that there was to be a meeting of counsel in the case with the Judge later on that day concerning this matter.

During the course of the day I checked to determine whether the status of this matter was changed. I learned that the status of the matter was not changed, that counsel for neither side was going to request a transcript of the

defendant's statement and that on the foregoing basis the Judge was not going to allow the press to obtain copies of the statement.

(s) Edgar A. Zingman.

Before me, a Notary Public in and for the Commonwealth and County aforesaid, personally appeared Edgar A. Zingman, this 14th day of January, 1959, and stated that the foregoing was true to the best of his knowledge, information and belief.

My commission expires May 22, 1962.

(s) Martha D. Jones,
Notary Public, Jefferson County
Kentucky.

(Seal)

AFFIDAVIT.

Commonwealth of Kentucky }
County of Jefferson } ss

John H. Amon, being first duly sworn, deposes and states as follows:

My name is John H. Amon. I live at 3523 Huon Drive, Louisville, Jefferson County, Kentucky. I am employed by the Courier-Journal & Louisville Times Company as a reporter for the Louisville Courier-Journal, assigned to cover the courts of Jefferson County and on Monday, January 12, 1959, I was so employed and so engaged.

In the course of my employment on Monday, January 12, 1959, I was present in the court room of the Jefferson Circuit Court, Criminal Branch, Second Division, Judge L. R. Curtis presiding, for the proceedings in Criminal Action Nos. 109577 and 109578, Commonwealth of Kentucky vs. William Floyd Owen. To my knowledge a motion for a new trial on behalf of the defendant had been pending in these actions since May of 1958, shortly after the defendant had received a death sentence in the foregoing for the murder of Mrs. Sophia Tarbis.

The case was called and after a preliminary discussion before the bench, attorneys and the Judge, defendant, myself and representatives of radio and T.V. stations adjourned to Judge Curtis' chambers. We were informed that Owen was changing his plea from not guilty to guilty and wished to make a statement to the Court. Owen's attorney told Judge Curtis he wished to have the press excluded from the chambers when he made his statement. Judge Curtis asked representatives of the press, radio and T.V. to leave. He told us in the presence of Owen, Owen's counsel and the Commonwealth Attorney's staff that any statement Owen might make would be a matter of public record and would be made available to us. With this assurance from Judge Curtis that the confession or statement would be made available to us we left the chambers, to enable Owen to make the statement for transcription by the official court stenographer, James M. Yoder, who was present in the chambers for that purpose.

Subsequently, after a short time the Judge, attorneys and defendant returned to the court room. A jury was placed in the box and Assistant Commonwealth's Attorney Laurence E. Higgins made a statement to the jury in which he explained the Owen case and told the jury that Judge Curtis had sustained Owen's motion for a new trial and that Owen was changing his plea from not guilty to guilty and the Commonwealth had agreed to give him a life sentence. This was done twice, in the case of Sophia Tarbis and in the case of Herman Tarbis. Judge Curtis then called Owen before the bench and sentenced him to a life term for each of the murders to be served concurrently.

Immediately I asked Judge Curtis if a transcript of the statement Owen made in chambers would be prepared for me. Judge Curtis said it would. Then, I asked James Yoder if he would prepare me a transcript. He said he would not. Then I asked Commonwealth's Attorney Hamilton if he would order it. He said that was a matter for the Judge to decide.

Later on I talked to Judge Curtis in his chambers about my inability to obtain a copy of the statement. Judge Curtis told me there was no question in his mind but that Owen's statement was a matter of public record. The only question in his mind, he said, was whether he had the authority to order the court stenographer to prepare a transcript of the statement unless it was ordered either by the Commonwealth or defense attorneys. Judge Curtis told me that we could have a copy of Owen's statement if someone in the Courier-Journal office could read Yoder's notes and make a copy. Later, Judge Curtis changed his position in this matter and refused to allow us to read the notes.

Since these occurrences on the morning and afternoon of January 12, 1959, I have made repeated and continued efforts to secure a copy of the stenographic notes of the Owen statement or to arrange to have the stenographic notes of the Owen statement read but I have been unable to arrange for either of the procedures because of the unwillingness of James Yoder to make the notes available unless expressly directed to do so by Judge Curtis and because of the refusal of Judge Curtis to so direct him and to allow the newspaper or any of its representatives to examine the notes of the statement.

(s) John H. Amon.

Before me, a Notary Public in and for the Commonwealth and County aforesaid, personally appeared John H. Amon at about 5:00 o'clock P.M., C.S.T., January 13, 1959, and stated that the foregoing was true to the best of his knowledge, information and belief.

My commission expires April 5, 1959.

(s) Edgar A. Zingman,
Notary Public, Kentucky at Large.

RESPONSE TO PETITION FOR WRIT OF MANDAMUS.

The Respondents, L. R. Curtis, Judge Jefferson Circuit Court, Criminal Branch, Second Division (hereinafter called Judge Curtis), and James M. Yoder, Official Court Stenographer, Jefferson Circuit Court, Criminal Branch, Second Division (hereinafter called Yoder), for response to the Petition for Writ of Mandamus state as follows:

1. This Court does not have jurisdiction over the Respondents or over the subject of this action.

2. Respondents move the Court to dismiss this action because Petitioner has no capacity to maintain it as it has no interest therein other than the interest of any member of the public.

3. The petition does not state facts upon which relief can be granted.

4. The Respondents deny that the Petitioner has a special or qualified interest in judicial or public records different from or in addition to any member of the public.

5. The Respondents deny that the accused, William Floyd Owen, had received a death sentence. In one case the jury in May 1958 returned a verdict of guilty, fixing the penalty at death, but no judgment was rendered because the accused within the time allowed by law filed a motion for new trial and no sentence was ever pronounced by the Court upon that verdict because the respective parties, by counsel, passed the matter for hearing from time to time until January 12, 1959.

The Respondents deny that the accused, William Floyd Owen, made a confession in the Court's Chambers. He made statements of fact to the Judge, but not a confession, and in open court he withdrew his plea of not guilty and entered a plea of guilty. In the Court's Chambers, and not in open court, the accused, William Floyd Owen, by counsel, advised the Court that he would make a statement in confidence and the Court agreed to hear the statement in

confidence solely for the purpose of enabling the Court to determine whether he would permit the accused, William Floyd Owen, to enter a plea of guilty to the charge.

The Respondents deny that a confession was made by the accused, William Floyd Owen, in the Judge's Chambers and deny that his confidential statement to the Judge is a material, or essential or any part of these proceedings.

The Respondents deny that the Commonwealth's Attorney made any statement to the jury about the possibilities of probation within a period of eight years, or any time.

The Respondents deny that the confidential statement made to Judge Curtis is concededly or at all a public record, or that the denial to members of the press of the opportunity to obtain and publish such statement is in violation of the First or Fourteenth Amendments to the Constitution of the United States, or that it constitutes an infringement of the freedom of the press, or a violation of due process of law, or of Sections 2, 8, 11 or 26 of the Kentucky Constitution, or that it is an exercise of absolute or arbitrary power, or a violation of freedom of the press, or a denial of the obligation of a public trial, or an attempt to subordinate the Bill of Rights of the Kentucky Constitution to the exercise of arbitrary power by a judicial officer, or that it is a violation of KRS 28.430.

6. The accused, William Floyd Owen, was indicted for the murder of Mr. and Mrs. Tarbis. In May 1958 he was tried for the murder of Mrs. Tarbis and the jury returned a verdict of guilty, fixing the penalty at death, but no judgment was rendered thereon because the accused, within the time allowed by law, filed a motion for new trial and no sentence was ever pronounced by the Court upon that verdict because the respective parties, by counsel, passed the matter for hearing from time to time until January 12, 1959.

Response to Petition for Writ of Mandamus

The motion for new trial was set for hearing on January 12, 1959, but before the hearing the Judge was informed that there had been conferences between the Commonwealth's Attorney and the accused's counsel and that the accused would want to change his plea from not guilty to guilty, and the accused asked permission to make a statement in confidence to the Judge before entering his plea. It has been the universal practice of Judge Curtis, before accepting a plea of guilty in cases where there is any doubt about the accused understanding such plea, and especially where he has theretofore pleaded not guilty, to question the accused to make sure that he clearly understands what his plea will mean. The hearing in chambers was solely for that purpose and what was said and done about this matter in the Court's Chambers was not and could not be under any circumstances a part of the official record of this case, and the Court having heard the statement made by the accused, William Floyd Owen, feels in good conscience and in conformity with his word given to the accused that he is not privileged to disclose the statement made under such circumstances by the accused, William Floyd Owen.

Wherefore, the Respondents, L. R. Curtis, Judge of the Jefferson Circuit Court, Criminal Branch, Second Division, and James M. Yoder, Official Stenographer of said Court, pray that Petitioner's petition for Writ of Mandamus be denied, and for all proper relief.

(s) Leo T. Wolford,
(s) Robert P. Hobson,
Attorneys for Respondents.

AFFIDAVIT OF JAMES R. BOWLES.

State of Kentucky }
County of Jefferson } Sct.

James R. Bowles says that he is Chief Clerk of the Criminal Division of the Jefferson Circuit Court and the custodian of all records pertaining to criminal prosecutions in that Court.

Affiant says that the statement made by William Floyd Owen in the Chambers of Judge L. R. Curtis on January 12, 1959, was not and is not a part of the record in the case of Commonwealth v. William Floyd Owen and was never ordered to be made a part of that record.

(s) J. R. Bowles.

Subscribed and sworn to before me by James R. Bowles this 20 day of January, 1959. My commission expires March 29, 1960.

(s) Dorothy K. McHugh,
Notary Public Jefferson County, Ky.

(Seal)

OPINION OF THE COURT BY JUDGE BIRD-- DENYING MANDAMUS.

The petitioner, Courier-Journal and Louisville Times Company, is the publisher of two daily newspapers in the City of Louisville.

The respondent, L. R. Curtis, is a judge of the Jefferson Circuit Court and the respondent, James Yoder, is a stenographic reporter for that court.

William Floyd Owen was twice charged with murder in the Jefferson Circuit Court. He was tried and convicted before Judge Curtis on the trial of one case and given the death penalty. He filed a motion for new trial. This motion and the other murder charge were pending before Judge Curtis. One or the other of the cases was called. Owen expressed his desire to make a statement privately to Judge Curtis in chamb s and asked that members of the press be excluded. Members of the press, including petitioner's representatives, were directed to withdraw. Upon their withdrawal Owen made his statement to Judge Curtis. The court reporter took the statement in shorthand in the presence of counsel for the defendant and the Commonwealth.

The petitioner requested that the shorthand notes be transcribed and that it be furnished a copy for the sole purpose of disseminating the news. No other interest is alleged or proven by the petitioner.

The judge and the reporter refused petitioner's request.

Petitioner contends that the statement of Owen is a public record and that it has a right to inspect it and procure a transcribed copy of it. This action demands that this Court invoke its injunctive processes to compel the judge and reporter to comply with its request.

For the purpose of this decision we find it unnecessary to determine whether the Owen statement is or is not a public record. If the Owen statement is a public record the para-

mount questions are these: (1) What right of inspection does the petitioner have? (2) Under what conditions may it enforce its right by injunctive process?

The petitioner has the same right as any other member of the public. Constitutional provisions concerning freedom of the press are not involved in this action. The press has no greater right to the information sought than any other member of the public. In Riley v. Lee, 88 Ky. 603, 11 S. W. 713, we said as follows:

> "• • • By the provisions of the United States and the state constitutions guarantying the 'freedom of the press' it was simply intended to secure to the conductors of the press the same rights and immunities that are enjoyed by the public at large. • • •"

What then is the right of a member of the public to inspect a public record and under what conditions may he enforce his right by mandamus?

In the absence of constitutional or statutory authority for the inspection of public records we must look to the common law.

The common law rule is concisely stated in 45 American Jurisprudence, pages 427-428 as follows:

> "• • • Every person is entitled to the inspection, either personally or by his agent, of public records, including legislative, executive, and judicial records, provided he has an interest therein which is such as would enable him to maintain or defend an action for which the document or record sought can furnish evidence or necessary information. This rule, it is said, is not so much a denial of the right of every citizen to inspect the public records and documents as a declaration of the interest which a private individual must have to avail himself of the extraordinary writ of mandamus to enforce his right. In theory the right is absolute, yet in practice it is so limited by the remedy necessary for its enforcement that it can be denominated only a

'qualified right.' The existence of a suit is not, however, a sine qua non for the exercise of the right."

We recognized and adopted this rule in the case of Fayette County v. Martin, 279 Ky. 387, 130 S. W. 2d 838. There we said as follows:

"Appellants cite the following statement of this common law rule, upon which they rely as sustaining and authorizing their right to inspect these franchise tax reports, which is found in 53 C. J. § 40, page 624: '*At common law a person may inspect public records in which he has an interest* or make copies or memoranda thereof, when a necessity for such inspection is shown and the purpose doesn't seem to be improper, *and where the disclosure would not be detrimental to the public interest.*'

"This common law rule is further thus stated in 23 R.C.L. § 10 page 160: 'It is quite generally conceded that there is no common law right in all persons to inspect public documents or records; and that right, if it exists, depends entirely on the statutory grant. But at common law, every person is entitled to the inspection, either personally or by his agent, of public records, including legislative, executive, and judicial records, *provided he has an interest therein which is such as would enable him to maintain or defend an action for which the document or record sought can furnish evidence or necessary information.*'

"*Conceding these to be proper statements of the general common law rule invoked by appellants, declaring the public's right to inspect and examine all public records in which they possessed the required interest,* the next question arising and presented for decision is whether or not the appellant's asserted common law right to inspect these records has been lost or qualified by the express inhibitions and provisions of the statutory enactment, section 4114i-13, and its later amendments." (Emphasis ours.)

See also 34 Cyc. 592; Good State v. McGroth, 104 Mont. 490, 67 p. 838; North v. Foley, 265 NYS 780, 238 Appeal Div. 731.

Kentucky has neither constitutional nor statutory provisions for public inspection of judicial records. The common law rule approved in Fayette County v. Martin will therefore be applied. Without the interest defined in the rule the right of inspection does not exist and without the right of inspection there is no right to mandamus or other mandatory process. Generally the interest required under the rule must be alleged and proven. However, in order to effectuate the notice-giving purpose of various recording acts such interest shall hereafter be presumed as to the following records:

(1) Records of all papers, documents and instruments required or permitted by statute to be recorded, or noted of record, in books provided by public funds for that purpose.

(2) All financial records required by statute to be kept in books so provided.

The presumption shall govern where papers, documents and instruments are required or permitted by statute to be recorded in such books and have been lodged for that purpose but unrecorded.

It is apparent that the common law right to inspect public records is far from absolute. Even in cases where the proper interest is shown or presumed the right to inspect may be denied where the disclosure would be detrimental to the public interest, and the right may always be reasonably regulated by the custodian so that such inspection will not interfere with the proper conduct of his office or the proper administration of the affairs of the agency served by him.

The petitioner neither alleges nor proves the interest required, and the matter involved is not such paper, document or instrument as would be governed by the presump-

tion stated. Having failed to establish a right to the relief sought the petition is dismissed.

Judges Stewart and Moremen dissenting.

Attorneys for Petitioner:

WYATT, GRAFTON & GRAFTON,
300 M. E. Taylor Building,
Louisville, Kentucky,

EDGAR A. ZINGMAN,
300 M. E. Taylor Building,
Louisville, Kentucky.

Attorneys for Respondents:

LEO T. WOLFORD,
501 South Second Street,
Louisville, Kentucky,

ROBERT P. HOBSON,
Ky. Home Life Building,
Louisville, Kentucky.

CONCURRING OPINION BY JUDGE MILLIKEN.

I concur in the conclusion of the majority opinion, but do not altogether agree with the reasoning by which that conclusion was reached. I think the writ was properly denied upon these two grounds: (1) There was no public record to which the petitioner had the right of access; and (2) it was within the discretionary power and right of the trial court not to require the transcript to be made and filed of record.

Let it be conceded that the trial of a case—particularly of a criminal prosecution—should take place under the public eye, although the constitutional right of a public trial is to safeguard the rights of the accused person and is for his benefit and is not the right or benefit of the state or anyone else. It is also suggested also that publication of the proceedings taken at the trial of a Commonwealth case comes within the broad term of "freedom of the press."

The hearing was no star chamber proceeding. The Commonwealth was represented by its attorney, and the defendant was present in person and represented by his attorney. Not everything said and done during the course of a trial is in open court or is a public proceeding. Proceedings before the court in chambers at which, in a criminal case, the defendant is present and represented by counsel, as here, are not rare. If the stenographer had not taken notes of the defendant's statement, we may suppose that no one would seriously contend that the trial judge should be compelled to tell what was said there. The circumstances of transcribing the defendant's statement in chambers is not of such transcendent importance as to convert the transcription into a public record.

The Circuit Court in this case had pending the defendant's motion for a new trial upon stated grounds. I do not construe the law to be that in granting a motion the court is obliged to state its reasons. It had been indicated during the argument that the defendant, who had been convicted in

one case and his punishment fixed at death, might withdraw his pleas of not guilty and plead guilty in both cases. If such a plea was to be made, it would have to be in person and in open court. Sec. 173, Criminal Code. This occurrence in chambers was but a preliminary thereto.

Should the judge in this case have declined to hear the defendant in the presence of counsl for both parties? Whether he should or not is now beside the question. He did not decline, and promised the defendant that newspaper reporters would not be present. Doubtless, the defendant believed that they would not be given access to his statement. Should the judge be now required by this court to break faith with the defendant? Should he not be allowed to keep the confidence? It seems to me that it would be unconscionable all around and against the principle of good faith and the sound administration of justice to require the judge to breach the confidence. Above all else, assurance and confidence in the integrity of a judge are paramount.

The eminent authority, Wigmore on Evidence, Volume 8, Sec. 2376, after pointing out that communications by an informer with a judge are not privileged, adds:

> "But is there not a distinct principle, by which communications in the nature of *confessions*, or simliar confidences, made privately and not in open court, by parties who are implicated in a wrong or crime and desire guidance for their course of action, are privileged from disclosure by him, at his option? No obstruction to the course of justice can be apprehended by allowing such confidences to be preserved. The necessity and propriety, for the administration of justice, of assuring official confidence to informants desiring to unburden themselves is even plainer when a judge is the repository of that confidence, than in the case of prosecuting officials. The judge is indeed the most appropriate person to represent the Law's confessor.

"The limits of the principle may be thus phrased: "A judge of any court, who as such receives information upon a matter criminal or civil, from a person, whether party or not, confessing his own offense or liability, is privileged to withhold testimony to such information, if received in confidence, when called as a witness in any proceeding not tried before himself. Whether a judge should in a given case with propriety receive such information at all, or receive it with a pledge of confidence, is a matter of judicial ethics; but when once received, the privilege applies."

I feel strongly that this was a matter to be determined by the judge in his discretion. Mandamus does not lie to control the exercise of a trial court's discretion. Moreover, this court's power under Section 110 of the Constitution authorizing it to control courts of inferior jurisdiction, it has been often said, will be exercised only to prevent injustice. The reduction of the penalty from death to life imprisonment can hardly be called an injustice to the defendant.

For these reasons I concur in the conclusion of the majority of the court to the effect that the petitioning newspapers are not entitled to the information sought.

DISSENTING OPINION OF JUDGE STEWART.

I dissent from the majority opinion.

The petition discloses this proceeding grew out of a notorious double murder of Herman Tarbis and Sophia Tarbis, his wife, which occurred in the City of Louisville on New Year's Eve in 1957. William Floyd Owen was indicted for these murders. A trial of one of the indictments in May of 1958 in the Jefferson Circuit Court, Criminal Branch, Second Division, over which the Honorable L. R. Curtis presides as judge, resulted in a conviction, and the death penalty was given. A motion for a new trial was seasonably filed by Owen, which was continued from time to time by agreement of counsel until January 12, 1959. When the motion was called, Owen indicated he would make a statement or confession relative to the double murder and enter pleas of guilty to each indictment but, before doing so, he requested Judge Curtis to hear him in chambers out of the presence of the jury and the newspaper reporters. Owen's request in this respect was complied with.

Thereupon, Judge Curtis, Owen, counsel for both the Commonwealth and the accused, accompanied by James M. Yoder, the official court reporter, retired from the court room to Judge Curtis' chambers. Owen then made a statement, which was taken down by Yoder. Shortly thereafter, Owen, Judge Curtis, counsel on both sides and Yoder returned to the court room where a jury was empaneled. Assistant Commonwealth's attorney, Laurence E. Higgins, then informed the jury that Owen had confessed and had changed his pleas of not guilty to guilty to both murders; and, upon the recommendation of Higgins, the jury in each case fixed the punishment of Owen at life imprisonment. While the record before us does not reveal when Judge Curtis sustained Owen's motion for a new trial on his first conviction, it was bound to have been after Owen made the statement in chambers and before the juries fixed his punishment on his pleas of guilty.

John H. Amon, a reporter for petitioner, Courier-Journal & Louisville Times Company, stated in his affidavit in the present action that when Judge Curtis notified the representatives of the newspapers they were excluded from his chambers, he told them in the presence of Owen and counsel on both sides that any statement Owen might make would be a matter of public record and would be available to the press. After the motion for a new trial had been sustained and after Owen had pleaded guilty and received a life sentence from each jury, Amon said Judge Curtis again assured him a transcript of Owen's statement would be prepared for dissemination to the public. Later, however, according to Amon, Judge Curtis changed his mind and refused to order Yoder to make up the transcript or to allow members of the press to examine the stenographic notes of the official court reporter.

The Court's opinion does not determnie whether the statement made by Owen is or is not a public record. Nevertheless, it holds that *even if* such statement is a public record, petitioner has no right to enforce inspection thereof by mandamus. The Court's opinion undertakes to buttress this declaration by directing attention to this language of a very ancient common-law rule which appears in Fayette County v. Martin, 279 Ky. 387, 130 S. W. 2d 838: "'* * * Every person is entitled to the inspection, either personally or by his agent, of public records, including legislative, executive and judicial records, provided he has an interest therein which is such as would enable him to maintain or defend an action for which the document or record sought can furnish evidence or necessary information. This rule, it is said, is not so much a denial of the right of every citizen to inspect the public records and documents as a declaration of the interest which a private individual must have to avail himself of the extraordinary writ of mandamus to enforce his right.'" This quotation is extracted from 45 Am. Jur., Records and Recording Laws, § 17, pp. 427-428.

Dissenting Opinion of Judge Stewart

It is positively (but, in my opinion, erroneously) stated in the Court's opinion that the Martin case adopted the foregoing excerpt as the rule, in essence, applicable to the general right to inspect public records, civil or criminal, in this jurisdiction. The majority opinion also declares with equal assurance that such principle is controlling in the case at bar. This stand taken by the Court's opinion requires an examination of the Martin case.

That case was an action by Fayette County and the City of Lexington for mandamus to compel Martin, Commissioner of Revenue of Kentucky at the time, to permit an examination of certain annual franchise tax reports. The *petitioners* (appellants) there claimed the common-law right to inspect the records. It was stated by the Court of Appeals that the above-quoted common-law principle was a proper statement of the common-law rule invoked by those petitioners; but it was then held that this claimed right had been *divested by a statutory enactment* (Chapter 4 of the first extraordinary session of the 1938 General Assembly). In other words, this Court, in effect, conceded the petitioners in the Martin case *had the required common-law interest*. This Court had no occasion to, and did not determine, what right of inspection a member of the public had who, perhaps, did not possess the common-law legal interest. Nowhere in the opinion does it expressly adopt petitioner's "claimed" common-law right as the rule in Kentucky. In short, the quotation inserted in the Martin opinion, setting forth the common-law rule as regards the right to inspect public records, was never applied to the factual issues raised because a statute prohibited the right so asserted by Fayette County. It follows the common-law rule appearing in the Martin case had no part in the decision of that case and, therefore, it must be considered obiter dictum.

Kentucky, admittedly, has neither constitutional nor statutory authority for the public inspection of judicial records, and we have shown the Martin case did not require

that Kentucky bind itself to the antiquated common-law rule relied upon there. The Martin case has never before been cited as laying down the common-law rule in respect to the right to inspect public records. It is believed that the case, in substance, intended to say no more than was stated in the earlier case of Barrickman v. Lyman, 154 Ky. 630, 157 S. W. 924, which is as follows:

> "Some of the older cases make a distinction between an examination of public records by the public in general and an examination by those having an interest in them, holding that in the latter case the right exists, while in the former it does not. Am. and Eng. Encyclo. of Law, Vol. 24, pp. 182, 183. *It is unnecessary in this case to determine whether or not this distinction prevails in this state. It is sufficient to say that plaintiff is not only a citizen and taxpayer, but has shown an interest in the records in question.*" (Emphasis ours.)

In 45 Am. Jur., Records and Recording Laws, § 18, p. 428, we have this language on the point under discussion which we believe should be considered the law of this Commonwealth, since it is the weight of authority on the right to inspect public records: "The English common-law rule that an inspection of public documents could be had by a private person only where he showed some legal interest to be subserved by the desired inspection • • • has not been generally observed in this country. It is not essential that the interest of a person desiring to inspect public documents be private and capable of sustaining a suit or defense on his own personal behalf. That common interest which every citizen has in the enforcement of the laws and ordinances of the community wherein he dwells has been held to entitle a citizen to the right to inspect the public records in order to ascertain whether the provisions of the law have been observed."

The case of Nowack v. Fuller, 243 Mich. 200, 219 N. W. 749, 751, in commenting upon the common-law rule relied

upon to deny the right of inspection in the case at bar, made this significant statement:

> "This rule adopted by the English courts has no basis in reason or justice. It is absurd to hold that a man could inspect the public records, providing his purpose was to use the information in some litigation, and to deny him the right to inspect for some other purpose that might be equally beneficial to him. It does not protect all of his substantial rights and has not been received with general favor in this country."

In the Court's opinion it is pointed out, quoting from Riley v. Lee, 88 Ky. 603, 11 S. W. 713, that the "freedom of the press" provision in the Constitution of Kentucky "was simply intended to secure to the conductors of the press the same rights and immunities that are enjoyed by the public at large." I agree petitioner has no greater right than any other member of the public to this transcript; but, if the transcript is a public record, which I will subsequently show it is, then any member of the public is entitled to get a copy of it from the court reporter by paying his customary fee. See New York Post Corp. v. Leibowitz, 2 N. Y. 2d 677, 143 N. E. 2d 256, 262.

This writer takes the view that newspapers have a legitimate interest in judicial or public records entitling them to a reasonable inspection of such records, though no legal interest, as such, would be thereby subserved. The case of Nowack v. Fuller, cited above, also offers a novel idea that may merit consideration, though it smacks against Riley v. Lee, cited above. That case proposes, that if it is believed one must have a "special" interest not possessed by citizens generally to be entitled to the remedy of mandamus, why does not a newspaper, in the business of publishing material of public interest, have such a special interest?

In Fayette County v. Martin, cited above, the petitioner there sought to gain access to franchise tax reports. The case at bar deals with the heinous murder of a respected

man and his wife, which aroused deep interest in the manner in which this case was disposed of in the Jefferson Circuit Court. Why was a previous death sentence meted out to Owen set aside? This fact can only be brought to light by the statement which was taken down by the official court reporter in Judge Curtis' chambers.

In Cowley v. Pulsifer, 137 Mass. 392, 394, 50 Am. Rep. 318, a leading case that points up the importance of full disclosure in criminal proceedings, Oliver Wendell Holmes, then a judge of the Supreme Court of Massachusetts, wrote the opinion for that court and first quoted this language from the English case of Rex v. Wright, 8 T. R. 293, 298:

> "'Though the publication of such (judicial) proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage of the country in having these proceedings made public, more than counterbalances the inconveniences to private persons whose conduct may be the subject of such proceedings.'"

This jurist then, in his own language, continued:

> "The chief advantage to the country which we can discern, and that which we understand to be intended by the foregoing passage, is the security which publicity gives for he proper administration of justice * * *. It is desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed."

These principles were generally approved in Paducah Newspapers v. Bratcher, 274 Ky. 220, 118 S. W. 2d 178. See also dissent of Froessel, J., United Press Assn. v. Valente, 308 N. Y. 71, 123 N. E. 2d 777, 787.

The case of Jackson v. Mobley, 157 Ala. 408, 47 So. 590, 592-593, had this to say on the policy of keeping all judicial steps taken in a criminal trial out in the broad daylight:

> "* * * In criminal cases, after arrest, it is not conceivable that the broad policy for openness and publicity of all judicial acts and processes relating to the prosecution, by the court itself or by public officers charged with duties thereunto, should suffer qualification in any respect, however preliminary, or in nature ex parte, the steps taken or action had may be. * * * Unless some wholesome reason exists to require secrecy, to the end that the court's function may not be defeated by publicity, no such dangerous qualification of the general policy of the open course of justice should, as administered through our courts, be sanctioned."

Are the stenographic notes Yoder made in the circuit judge's chambers of Owen's statement a public record? The proceedings before this Court do not show upon what grounds Owen relied in his motion for a new trial. If one of the grounds was newly discovered evidence, and was supported by the affidavit of Owen in the manner required by law, then Judge Curtis was justified in hearing what Owen had to say, as the Legislature has left the procedure in such instances to be regulated by the courts. When Judge Curtis heard Owen's statement in chambers, it was but a part of the proceedings in court to determine whether or not he would grant Owen a new trial, just the same as if he had heard Owen's testimony in the court room. It is not unusual in the trial of both civil and criminal cases for counsel and the judge, accompanied by the reporter, to retire to chambers where testimony is heard outside the presence of the jury and reported for the benefit of the record.

I believe the statement Owen made in chambers, in the hearing upon the motion for a new trial, and upon which the judge evidently granted him a new trial, was a part of the court record. Therefore, it became a public record, and any member of the public who might desire it is entitled to a transcript thereof.

Another reason why this statement of Owen should be considered a public record is that KRS 28.410 provides that each circuit judge may appoint an official reporter for his court. By KRS 28.420, the reporter is required to take an oath of office. Under KRS 28.430, if the presiding judge is of the opinion that the testimony in any proceeding should be preserved, he shall direct the reporter to take full notes of the proceeding; and in all criminal proceedings, upon motion of either party, the court shall order the reporter to make in duplicate a full transcription of his notes. If an appeal is later taken from the judgment entered in the circuit court, the original transcript shall be filed among the papers to be used in making up the bill of exceptions for the Court of Appeals and the duplicate shall be filed with the papers and remain in the office of the clerk of the court as a public record. The reporter's salary is fixed in KRS 28.450. In view of what has been said the official court reporter is a public officer (it was so held in Love v. Duncan, Ky., 256 S. W. 2d 498), and his notes of a proceeding when transcribed become a public record.

Among other things it is provided in Section 11 of the Constitution of Kentucky that in all criminal prosecutions an accused shall have a public trial. This salutary provision does not mean that the presiding judge may not limit the number of spectators in the court room to prevent overcrowding, or that he may not exclude children from hearing a trial of a salacious nature. It does mean, however, that he may not exclude members of the press. The press is there as a representative of the public. If, as representatives of the public, newspaper reporters have the right to attend the trial, they likewise have the right to obtain a

copy of the court reporter's transcript of the proceedings, at their own expense, when they make a reasonable request therefor, and when the reporter or the court will not be hindered or hampered by such request.

I am not unmindful of the good motives which actuated Judge Curtis to think that what Owen said to him was of a confidential nature and to conclude that he could not in good conscience have the court reporter transcribe Owen's statement. I seriously doubt, however, that in any criminal prosecution a trial judge may permit the accused to make during the trial, or at any time during a hearing on a motion, a confidential statement to him bearing on his guilt or innocence which does not become a part of the court record. Respondents rely upon 8 Wigmore (3rd Ed.) § 2376, p. 759, as sustaining their position that Owen's statement was confidential and privileged. This text does not support their position, because the statement Judge Curtis heard was in a proceeding then pending before him, while Wigmore deals with statements made to a judge in confidence before the person making the same was charged with a crime. Wigmore in a footnote in his text on this point says, "The precedents are few," and then cites Lindsey v. People, 66 Col. 343, 118 P. 531, and Pierson v. Steortz, 1 Morris, Ia. 136. An examination of these authorities plainly indicates they have no relation to the question raised here.

If a trial judge is permitted to hold as confidential a statement by an accused bearing on his guilt or innocence made during the trial, or made during the hearing on his motion for a new trial, and then may refuse to have his court reporter transcribe and furnish to the press such statement, we are but a step from "Star Chamber" proceedings in a free country where our Constitution provides the accused shall have a public trial. Admittedly, this constitutional provision is for the benefit of the accused and not for that of newspaper reporters, yet if a court may decline to make public court proceedings at the request of

the accused, there is nothing to prevent his doing so at the prosecutor's request or on the judge's own volition. Thus, what was intended by the framers of our Constitution as a benefit to the accused may be used to his great disadvantage. It seems to me a system could evolve whereby the general public could be excluded from knowledge of what transpires at any or all criminal trials.

I would grant the writ of mandamus directing Judge Curtis to order Yoder to make a transcript of his notes taken on the hearing in chambers and thereafter furnish the transcript to petitioner upon the payment of Yoder's fee.

Moremen, J., joins with me in this dissent.

APPENDIX C

COURT OF APPEALS OF KENTUCKY

File No. W-23-59

COURIER-JOURNAL AND LOUISVILLE TIMES COMPANY, - - - - - Petitioner,

versus

THE HON. L. R. CURTIS, ET AL., - Respondents.

Appeal from Jefferson Circuit Court.

ORIGINAL ACTION PETITION FOR REHEARING AND AUTHORITIES IN SUPPORT.

WYATT, GRAFTON & GRAFTON,
300 Marion E. Taylor Building,
Louisville 2, Kentucky.
WILSON W. WYATT,
ARTHUR W. GRAFTON,
EDGAR A. ZINGMAN,
Counsel for Petitioner.

I certify that copies of this Brief were mailed postage prepaid to Counsel for Respondents this 23rd day of October, 1959, pursuant to R.C.A. 1.250.

Counsel for Petitioner.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

The dismaying length of this Brief is attributable to the difficulties inherent in asking a court to rescind a previous decision. We believe the May 22, 1959 opinion results in a denial of fundamental constitutional and common-law rights. A less exhaustive treatment under these circumstances would have been a disservice to the Court and to the rights involved.

For the burden imposed we apologize. We trust that the Court will find the exposition a justified aid in ruling upon the issues presented.

POINTS AND AUTHORITIES.

PAGE

I. INTRODUCTION 1– 6

Is Petitioner, as a member of the general public and as a newspaper engaged in the business of gathering and disseminating news concerning matters of public interest, entitled to obtain a copy of a confession made by one under sentence of death for a double murder; where such confession was made to the Court in its chambers and transcribed by the official court stenographer as part of the proceedings upon a motion for a new trial; where prior to making of the statement, when the accused requested that reporters be excluded from chambers during this statement, the accused was advised by the Court that any statement made would be a public record and available to the reporters subsequently; and where such statement was relied upon by the Court in sustaining the motion for new trial and was referred to by the Commonwealth's Attorney in his argument to the jury at the new trial as a confession of guilt upon which the jury was requested to enter a life sentence?

We believe that the only proper answer to this question is "*Yes.*"

U. S. Constitution 14th Amendment.
Ky. Constitution, Sections 2, 8, 11, 26.

II. THE UNDISPUTED FACTS 6–12

R.C.A. 1.430.

III. THE OPINIONS OF MAY 22, 1959 12–21

A. The Opinion of the Court by Judge Bird ... 13–15

Fayette County v. *Martin*, 279 Ky. 387, 130 S. W. 2d 838 (1939).

45 Am. Jur., *Records and Recording Laws*, § 17, pages 427-428.

1. It gives no recognition to the significant and controlling facts that the confession was part of the judicial proceedings and was relied upon by the Court in sustaining the motion for a new trial and in granting the new trial which resulted in the change of the defendant's sentence from death to life.

2. It gives no recognition to the fact that the defendant was advised at the time the press was excluded that any statement or confession made by the defendant would be a public record subsequently available to the press.

3. It gives no recognition to the fact that the Court never changed its opinion that the confession was a public record available to the press but that the Court's only difficulty concerned whether it had the authority to order the court stenographer to prepare a transcript at Petitioner's cost.

4. It mistakenly asserts that the common-law rule requires an interest in a public record sufficient to maintain or prosecute a legal action when the very authority quoted points out that this rule has not been adopted generally in America.

5. It mistakenly asserts that the restrictive common-law rule was adopted by this Court in the case of *Fayette County* v. *Martin*, when in truth that case did not rely upon or adopt the restrictive common-law rule, but held that the issue of inspection there was controlled by statute even if it was conceded that the common-law rule was as stated by the parties thereto.

PAGE

6. It completely and mistakenly omits reference to the contention advanced by Petitioner that the denial of the right of inspection here is a deprivation of the public right to have criminal trials publicly and openly held, absent some overwhelming consideration necesary to the furtherance of the administration of justice for which no contention has been made here.

7. It overlooks and mistakenly omits any reference to the contention advanced by Petitioner that the action of the lower court here constitutes censorship of press report of judicial proceedings, and as such violates the rights of freedom of the press guaranteed by the United States and Kentucky Constitutions.

B. The Concurring Opinion by Judge Milliken 16-17

8 Wigmore, *On Evidence*, § 2376.

1. It mistakenly asserts that the right of a public trial is a right accruing to the accused alone and that neither the public nor anyone else has any benefit or interest in this right.

2. It mistakenly states that the defendant believed that the press would not be given access to his statement, contrary to the uncontested facts in this record that the defendant was advised when the press was excluded that any statement made by the defendant would be a public record and available to the press.

3. It mistakenly asserts the rule from *Wigmore* as applying to confessions made to a judge in a case upon which the judge was sitting, when, in fact, the rule quoted from *Wigmore* applies only to situations

PAGE

where information of a confidential nature is conveyed to a judge in a matter which is not before him.

C. The Dissenting Opinion of Judge Stewart Concurred in by Judge Moremen 18-21

Fayette v. *Martin*, *supra*.

45 Am. Jur., *Records and Recording Laws*, *supra*.

Barrickman v. *Luman*, 154 Ky. 630, 157 S. W. 924 (1913).

45 Am. Jur., *Records and Recording Laws*, § 18, page 428.

Couley v. *Pulsifer*, 137 Mass. 392, 394.

Paducah Newspapers v. *Bratcher*, 274 Ky. 220, 118 S. W. 2d 178 (1937).

IV. ARGUMENT 22-83

(The Questions):

1. What documents and records constitute public records?
2. What right exists in the general public and in newspapers in particular to have access to and copy and inspect public records?
3. What right does the general public have in the constitutional guarantees of a public trial?
4. To what extent does the constitutional guarantee of freedom of the press grant to newspapers and their representatives access to the proceedings and records of criminal trials?
5. Is mandamus the appropriate relief for a denial of any of the foregoing rights by a trial judge?

(The Answers):

1. Records of all that transpires in a judicial proceeding, including the proceedings taken down by the official court stenographer which are referred to in subsequent proceedings in open court and which were apparently relied upon by the court in granting the motion for a new trial in a case involving two of the most heinous crimes ever committed in the State of Kentucky are public records.

2. Any member of the general public having a legitimate interest therein has a right to inspect or copy public records, and those engaged in the business of gathering and publishing news have such a requisite interest enabling them to inspect records either under the restrictive common-law rule which has never been generally adopted in this country or upon the broader majority rule.

3. The right of public trial guaranteed by the constitution and common-law in all jurisdictions in this country is the right not only of the accused but the right of the public generally and any member of the public having an interest therein such as a newspaper in the business of gathering and disseminating news has standing to enforce this right.

4. The constitutional guarantee of freedom of the press extends to the newspapers in the exercise of rights under the guarantee as members of the general public the right to learn and to publish all facts concerning what transpires in our courts and a denial of the rights of newspapers to learn of such facts and to publish news concerning them is a denial of the constitutional

guarantee of the press, absent special limitation where the administration of justice specifically requires that denial be made.

5. In the event any of the foregoing rights are denied or interfered with by a Circuit Judge in any jurisdiction of Kentucky, the sole and appropriate remedy for one whose rights have been denied is a petition to the Court of Appeals of Kentucky for a writ of mandamus.

A. The Ancient and Discredited Common-Law Rule Limiting the Right of Inspection of Public Records to Those Individuals Having an Interest in Such Records as Would Enable Them to Maintain or Defend an Action For Which the Document or Records Sought Can Furnish Evidence or Information Has Never Been Adopted in Kentucky .....

45 Am. Jur., pages 427-428, *supra*.

Nowack v. *Fuller*, 243 Mich. 200, 219 N. W. 749 (1928).

45 Am. Jur., *Records and Recording Laws*, § 18, page 428.

Fayette v. *Martin*, *supra*.

53 C. J., *Records*, § 40, page 624, 625.

23 R. C. L., *Records*, § 10, page 160.

53 C. J., *Records*, § 43, page 628.

53 C. J., *Records*, § 48, page 631.

23 R. C. L., *Records*, § 14, page 164.

76 C. J. S., *Records*, § 36, page 140.

76 C. J. S., *Records*, § 37f, page 145.

PAGE

B. The Weight of Authority in Those Jurisdictions That Have Had Occasion to Pass On the Question Presented Here Is That Petitioner Is Entitled As of Right to Have Inspection of the Stenographic Notes of the Confession Made by Owen and That the Writ of Mandamus Prayed For Should Be Granted 37-51

In re Shortridge, 99 Cal. 526, 34 Pac. 227, 228, 229, 230 (1893).

E. W. Scripps Company, et al. v. *Fulton*, Ohio, 125 N. E. 2d 896, 899, 900, 903, 904 (1955).

State v. *Copp*, 15 N. H. 212, 215.

N. Y. Post Corporation v. *Leibowitz*, 2 N. Y. 2d 677, 163 N. Y. S. 2d 409, 412-413, 414, 417, 418, 419 (1957).

United Press Ass'n v. *Valente*, 308 N. Y. 71, 123 N. E. 2d 777 (1954).

C. Judicial Records Are Public Records, and the Notes of the Official Court Stenographer Constitute Public Records Which May Be Had By a Member of the General Public Such As the Petitioner 52-57

N. Y. Post Corp. v. *Leibowitz*, *supra*.

Black's, *Law Dictionary*, page 1506 (3d Ed.).

Barrickman v. *Lyman*, 154 Ky. 630, 157 S. W. 924, 926 (1913), *rehearing den.*, 155 Ky. 710, 160 S. W. 267 (1913).

People v. *Harnett*, 226 N. Y. S. 341 (1927).

In re Freeman, N. J., 68 Atl. 222, 223 (1907).

Keddington v. *State*, 19 Ariz. 457, 172 p. 273, 274 (1918).

Amos v. *Gunn*, 84 Fla. 285, 94 So. 615, 634 (1922).

Mathews v. *Pyle*, 75 Ariz. 76, 251 p. 2d 893, 895 (1952).

International Union v. *Goodland*, 251 Wis. 502, 29 N. W. 2d 730, 735 (1947).

K.R.S. 28.410.

K.R.S. 28.420.

K.R.S. 28.430.

K.R.S. 28.440.

K.R.S. 28.470.

K.R.S. 28.500.

Love v. *Duncan*, Ky., 256 S. W. 2d 498 (1953).

D. Newspapers and Their Representatives Have the Common-Law Interest to Entitle Them to Inspection of Public Records 57, 64

Nowack v. *Fuller*, *supra*.

Schmedding v. *May*, 85 Mich. 1, 48 N. W. 201, 202 (1891).

Cowley v. *Pulsifer*, *supra*.

Bend Publishing Co v. *Haner*, Oreg., 244 Pac. 868, 870 (1926).

Holcombe v. *State*, Ala., 200 So. 739, 746-747 (1941).

McCoy v. *Providence Journal Co.*, 190 F. 2d 760 (1st Cir. 1951).

Disabled Police Veteran's Club v. *Long*, Mo., 279 S. W. 2d 220, 223 (1955).

In re Mosher, 248 Fed. 2d 956, 958-959 (C.C.P.A. 1957).

14 Am. Jur., *Courts*, § 148, page 354.

76 C. J. S., *Records*, § 35-p. 133; § 35(a) pp. 133-134; § 36 p. 140; § 37 p. 145.

Letter, *Attorney Gen. of Ky.*, 8/16/51.

Letter, *Attorney Gen. of Ky.*, 10/1/58.

Paducah Newspapers v. *Bratcher*, at 179, *supra*.

PAGE

E. The Exclusion of the Press Here and the Refusal to Subsequently Allow the Press to Learn What Transpired in Chambers, Constitutes a Denial of the Public Right in a Public Trial in Violation of the Fourteenth Amendment to the United States Constitution and in Violation of Sections 2, 8, 11 and 26 of the Kentucky Constitution and the Common-Law 64-76

Scripps v. *Fulton*, *supra*.

In re Shortridge, *supra*.

Cooley, 1 *Constitutional Limitations*, p. 647.

United Press Assn's v. *Valente*, *supra*.

Coke, *Second Institutes*, Vol. 1, p. 103 (1797).

Lilburne, Haw. St. Tr. 1270, 1273-74 (1649).

Matter of Oliver, *supra*, at 266-267.

Colonial Laws of Mass., pp. 29-68, at 35 (1889 Ed.).

Blackstone, *Commentaries*, B. 3, p. 373.

Hale, *History of the Common Law of England*, ch. XII, p. 343 (6th Ed. 1820).

Jenks, *The Book of English Law*, p. 91 (3d Ed. 1932).

9 *Halsbury's Laws of England*, § 705.

6 Wigmore *On Evidence*, § 1834 (3d Ed.).

Scott v. *Scott*, A. C. 417, 438 (1913).

In re Oliver, 333 U. S. 257, at 271-272 (1948).

Craig v. *Harney*, 331 U. S. 367, at 374 (1946).

Maryland v. *Baltimore Radio Show*, 338 U. S. 912, at 919-920 (1949).

Constitution of Kentucky, § 2, 14.

People v. *Jelke*, 308 N. Y. 56, 123 N. E. 2d 769, at 771 (1954).

PAGE

Lee v. Brooklyn Union Publishing Company, 209 N. Y. 245, 248, 103 N. E. 155, 156 (1913).

Rudd v. Hazard, 266 N. Y. 302, 307, 194 N. E. 764, 765 (1935).

Comment, *Public Trial in Criminal Cases*, 52 Mich. L. Rev. 128 at 135 (1953).

Note, *Criminal Law—Public Trial—Enforceable Right in Members of the Public*, 40 Minn. L. Rev. 711 at 717.

Note, *Publicity of Proceedings—Courtroom Barred to Public*, 6 Cath. U. L. Rev. 175, at 179 (1957).

Comment, *Right of Public to Attend a Criminal Trial*, 31 N.Y.U. L. Rev. 611 (1956).

Note, *Right of Public to be Admitted to Criminal Trial Over Objections of Accused*, 13 Wash. & Lee L. Rev. 199, at 204 (1956).

Radin, *The Right to a Public Trial*, 6 Temp. L.Q. 381, at 392 (1932).

F. The Refusal to Allow the Petitioner and Its Representatives to Obtain a Copy of the Stenographic Notes of the Confession Here Is a Denial of Petitioner's Freedom of Press Under the Fourteenth Amendment to the United States Constitution and Under Section 8 of the Constitution of Kentucky 76-81

Barstyn v. Wilson, 343 U. S. 495, at 500 (1952).

Shelley v. Kraemer, 334 U. S. 1 (1948).

Near v. Minn., 283 U. S. 697 (1931).

Grosjean v. American Press Co., 297 U. S. 233 at 250 (1936).

DeJonge v. Oregon, 299 U. S. 353 (1937).

Lovell v. Griffin, 303 U. S. 452 (1938).

PAGE

Associated Press v. *U. S.*, 326 U. S. 1, at 20 (1945).

Bridges v. *California*, 314 U. S. 252, at 268 (1941).

Craig v. *Harney*, *supra*, at 374.

G. The Writ of Mandamus Is the Appropriate Remedy Here and Petitioner Has Standing to Request It 81–83

Constitution of Kentucky, § 110.

Commonwealth v. *Berry*, 29 K. L. R. 234, 92 S. W. 936 (Case 3, 1906).

Commonwealth v. *McCrone*, 153 Ky. 296, 155 S. W. 369 (1913).

Motch v. *Middlesboro*, 242 Ky. 653, 47 S. W. 2d 56 (1932).

V. SUMMARY 83–84

The Opinion of May 22, 1959, Should Be Rescinded and the Petition for Writ of Mandamus Granted. To Deny the Writ Would Be to Reverse the Common Law and to Establish a Precedent in Kentucky in Violation of the Fundamental Rights of Inspection of Public Records, the Public Right to Attend Public Trials, and Freedom of the Press.

IN THE

COURT OF APPEALS OF KENTUCKY

File No. W-23-59

COURIER-JOURNAL AND LOUISVILLE TIMES COMPANY, *Petitioner,*

v.

THE HON. L. R. CURTIS, ET AL., *Respondents*

ORIGINAL ACTION PETITION FOR REHEARING AND AUTHORITIES IN SUPPORT.

May it please the Court:

I. INTRODUCTION.

Petitioner seeks a rehearing and reconsideration of the decision of the Court in this cause as set out in the Opinions of May 22, 1959. As will be developed below, Petitioner is convinced that the decision of May 22, 1959 stems from fundamental misinterpretation of prior authorities and from a misunderstanding of the underlying uncontroverted facts.

It is perhaps not unexpected that a defeated litigant should express itself this way. The statement here, however, embodies much more than the natural reaction of the unsuccessful partisan. In absolute and sincere candor, Petitioner states to the Court that the issues presented here far transcend the immediate

interest of this Petitioner in the matter at issue. As Petitioner has previously attempted to indicate to the Court, despite the insistence of counsel for Respondents that no good could be served by the relief contended for by Petitioner, the decision of this case if left unchanged will have far reaching adverse effects upon important constitutional rights of the general public, and of newspapers as members of that public and as persons engaged in the specialized business of gathering and disseminating news concerning matters of public interest.

It is indeed disappointing to Petitioner to find that the Opinion of May 22, 1959 resolves the issues in a manner that weakens and lessens the traditional constitutional safeguards and liberties involved in the doctrines of the public right to inspection of public records, the public right in public trials, and freedom of the press. It is even more distressing, however, to find that the Opinion which Petitioner believes has such an effect makes but little reference to these underlying constitutional issues, consideration of which was urged upon the Court by Petitioner, and accepts as controlling precedent a rule of law which departs from that rule accepted and guarded in almost every American jurisdiction.

In addition, it needs no citation of authority to establish that the traditional concern with justice in our society requires not only that justice be done in our courts but that the integrity and trust reposing in courts be upheld by insisting also that the courts give the appearance that justice has been done.

While the underlying facts will be detailed *infra*, one cannot embark upon an examination of this case without first recognizing these controlling considerations. On New Year's Eve 1957, an elderly Louisville couple was cruelly and brutally beaten to death. William Floyd Owen was found guilty of each of the murders and a death sentence was imposed in each case. Subsequently, on January 12, 1959, Owen's cases were called for hearing upon motions for a new trial which had been timely filed. A conference was held at the bench and the Court, defendant, and counsel then repaired to the Judge's chambers. There, at Owen's request members of the press were excluded from chambers after the Judge stated that any statement made by Owen would be a public record and would thereafter be available to the press. Subsequently, the Judge, Owen, counsel, and the official stenographer returned to the courtroom. The Judge announced that the motion for a new trial had been sustained, a jury was impaneled, Owen changed his plea from not guilty to guilty, and the Assistant Commonwealth's Attorney addressed the jury. He referred to a "confession" made by Owen in chambers, without revealing its contents, and requested the jury to return a verdict of guilty with the imposition of a life sentence. After this was done in each case the Judge imposed a life sentence in each to be served concurrently. Thereafter, the Judge reiterated his earlier statement that the confession was a public record available to the press, but then denied the press the right of access without offering any reason other than his

solicitude, for the confessed perpetrator of two of the most infamous crimes ever committed in this state.

Where is the appearance of justice so zealously guarded by the courts? What happened in the chambers to snatch Owen from certain death and to grant in exchange a possible eight year stay in the penitentiary? What grounds were offered in support for the motion for a new trial? Was Owen really guilty of these bloody crimes? What accessories or accomplices were named in Owen's confession? Why the secrecy? Why????

We do not raise these questions in any attempt to attack or impugn the Judge or counsel. We are convinced that there are proper answers to all of them. The questions however, demonstrate how easily what transpired, if left in its inexcusable cloak of mystery, can and must lead to a destruction of public faith in our courts. It is submitted that doctrinal and legal precedents aside, unless there is overwhelming reason for maintaining secrecy here, every sound concern for the integrity of our courts and the faith of our people in their judicial institutions, demands that this arbitrarily imposed huggermuggery be ended.

It will be the respectful endeavor of this Brief to convince the Court that the foregoing is sound argument; and that this case squarely poses the fundamental policy and constitutional issues alluded to, and requires that the Court should specifically consider them in arriving at its decision. Petitioner believes that a fair consideration of the issues and their bear-

ing upon the facts here will necessarily lead the Court to grant the relief sought.

At the very least, Petitioner urges upon the Court, that because of the long-range significance of the questions posed, the Court comprehensively state for the guidance of all its reasoning and authorities in arriving at any result. To do less would be to render a disservice both to the litigants here and to the public at large. Petitioner urges further, a reconsideration of the narrow and restrictive rule of inspection announced in the May 22, 1958 Opinion.

The facts of this case are uncontraverted and will be developed fully below. As a guidance for the Court, however, the issues and fact situation here can be briefly summarized as follows:

> Is Petitioner, as a member of the general public and as a newspaper engaged in the business of gathering and disseminating news concerning matters of public interest, entitled to obtain a copy of a confession made by one under sentence of death for a double murder; where such confession was made to the Court in its chambers and transcribed by the official court stenographer as part of the proceedings upon a motion for a new trial; where prior to the making of the statement, when the accused requested that reporters be excluded from chambers during this statement, the accused was advised by the Court that any statement made would be a public record and available to the reporters subsequently; and where such statement

was relied upon by the Court in sustaining the motion for new trial and was referred to by the Commonwealth's Attorney in his argument to the jury at the new trial as a confession of guilt upon which the jury was requested to enter a life sentence?

We believe that the only proper answer to this question is "*Yes.*"

This is so because the right of access and knowledge contended for here is guaranteed in this situation by the provisions of the Fourteenth Amendment to the United States Constitution and Sections 2, 8, 11, and 26, of the Constitution of Kentucky, and by the provisions of the common law which are a part of the law of Kentucky. These guarantee to all persons, and especially the newspapers engaged in the business of gathering and publishing news concerning matters of public interest, the right to inspect and to copy public records. They further guarantee to members of the public the right to have all trials open and public, except for special situations which are not relevant here, and guarantee to the public and to newspapers the freedom of the press to publish without censorship the facts of events transpiring in our Courts.

II. THE UNDISPUTED FACTS.

R.C.A. 1.430 provides that evidence on petitions for special writs will be by depositions taken upon notice or by affidavits. In addition, R.C.A. 1.420 requires the petition seeking such relief to be verified. Except for an affidavit filed by the Clerk of Judge Curtis' Court, attesting to the fact that the stenographic notes of the confession made by the [illegible] ically made a part of the records of that Court, all of the underlying facts here must be gathered from the verified Petition and the affidavits filed by Petitioner. While this would normally require the facts asserted therein to be accepted as true, their validity in these documents is further established by the fact that at the oral argument in this cause, Judge Curtis and the Honorable Laurence Higgins, the Assistant Commonwealth attorney who participated in the trials below out of which these issues arose, were present and listened without comment, rebuttal, or contradiction to the statement of facts by Petitioner as set out in these documents.

These documents, copies of which are filed in the Appendix to this Brief (hereafter cited, App. ——), establish that in criminal actions Nos. 109577 and 109578, Commonwealth of Kentucky v. William Floyd Owen, Jefferson Circuit Court, Criminal Branch, Section Division, Judge L. R. Curtis presiding, in May of 1958, the jury had returned verdicts of guilty of the crime of murder and had found sentences of death

for the defendant. These trials were the result of two brutal and sadistic murders of a respectable elderly business couple in the community of Louisville on New Year's Eve in 1957. The horrible murders were the subject of wide-spread community interest and were given substantial publicity in Petitioner's newspapers.

After the imposition of the death sentences, counsel for the defendant timely filed a motion for a new trial. By agreement this motion was passed until it came up before the Court on January 12, 1959. On that date, defendant's counsel approached the bench and indicated to the Court that before the Court passed upon the motion for a new trial the defendant wished to make a statement to the Court in chambers. Members of the press, as was their custom and procedure, followed the parties, counsel and the official stenographer, into the chambers.

At that point, counsel for the defendant advised the Court that the defendant wished to have the press excluded from the chambers while the defendant made his statement "because the press already had enough about him." Judge Curtis indicated he would comply with this request and asked the representatives of the press, radio and television to leave. *However, at that time in the presence of the defendant, defendant's counsel and the Commonwealth Attorney's staff, the Judge stated that any statement which the defendant might make would be a matter of public record and would be available to the members of the press.* With this assurance from the Judge, and in reliance upon this assurance, the members of the press

left without attempting to raise any legal issue or take any other action which would determine at the time their right to have a copy of the defendant's confession. Subsequently, in the presence of his counsel, the Commonwealth's attorney, and Judge Curtis, Owen, purportedly made a full confession of the crimes which was taken down by the official court stenographer who was present in the chambers for that purpose.

After this was done, the Judge, the attorneys and the accused returned to the courtroom. A jury was then impaneled and Assistant Commonwealth's Attorney, Laurence E. Higgins, made a statement to the jury. He explained the background of the case, advised the jury that the Court had now sustained the defendant's motions for new trials and that the defendant had changed his plea from "not guilty" to "guilty." He stated that the Commonwealth had agreed to recommend a life sentence. In each of the two murder cases, in addressing the jury, the Assistant Commonwealth's Attorney specifically referred to the fact that the defendant had made a confession of the crime to the Court in chambers. The jury then in each case returned a verdict of "guilty" with life imprisonment and the Court then sentenced the defendant to a life term for each of the murders to be served concurrently (App. 3, 11).

Immediately after those proceedings John Amon, a reporter for one of Petitioner's papers, asked Judge Curtis if a transcript of the confession made by the defendant, Owen, in chambers would be prepared for

this reporter. *Judge Curtis advised the reporter that it would.* Subsequently, when the reporter asked the official court stenographer to prepare a transcript, the official court stenographer refused to do so. The reporter then contacted Judge Curtis again and *Judge Curtis advised the reporter that there was no question in the Judge's mind that Owen's statement was a matter of public record.* The Judge stated that he did have a question as to whether he had the authority to order the Court stenographer to prepare a transcript of the confession unless it was ordered either by the Commonwealth or defense attorneys. The Judge suggested; however, that if someone in the Petitioner's office could read the official stenographer's notes, then the Petitioner would be free to obtain a copy of the confession in that manner. Subsequently, the official court reporter again posed objections to the furnishing of the statement.

Upon being contacted, Judge Curtis reaffirmed his previous statements that the confession was a public record and that he, Judge Curtis, had advised the defendant, Owen, at the time of exchange in the Judge's chambers that the confession would be a public record and available to the press. The Judge still took the position that under the provisions of KRS 28.430 he did not believe he had the authority to order a stenographic transcript of the proceedings or any part of them unless either the defense or the Commonwealth requested it. Later, after further exchanges between the Judge and representatives of the Petitioner, in which none of the foregoing was contradicted or re-

versed, the Judge finally took the position that the official stenographer's notes of the confession would not be available for reading or transcription by any agent or representative of the press (App. 3, 10, 12).

In this state of affairs, on January 14, 1959, this Petition for a Writ of Mandamus was filed (App. 1). The Petition set out the underlying facts and had appended to it two affidavits attesting to these facts (App. 6, 10). It was alleged that the Petitioner had a special and qualified interest in judicial and public records so as to entitle its agents, servants and employees to access to those records, to copy such records for purposes of publication and otherwise furnishing news concerning judicial proceedings to the members of the reading public (App. 2). In addition, the Petition alleged that the denial to members of the press of the opportunity to obtain and publish in full the substance of the defendant's confession, *which Judge Curtis himself conceded was a public record*, constituted a violation of the provisions of the Fourteenth Amendment to the Constitution of the United States of America (in that it violated those provisions prohibiting state action interfering with freedom of the press and in violation of due process of law which requires a public trial), and that this action was further a violation of the provisions of Sections 2, 8, 11 and 26 of the Constitution of Kentucky (in that it constituted an exercise of absolute and arbitrary power, a violation of the freedom of press, a denial of the guaranty of a public trial, and an attempt to subordinate the Bill of Rights of the Constitution of Ken-

tucky to the exercise of arbitrary power by a judicial officer) (App. 4). It was further set out in the Petition that KRS 28.430 was violated insofar as that section required that proceedings in criminal actions be held publicly and open to all members of the public having a legitimate interest therein, of which class the Petitioner is a member (App. 4). The Petition then prayed for a Writ of Mandamus requiring the official court stenographer to furnish the Petitioner official court stenographer to furnish the Petitioner, at Petitioner's cost, a copy of the confession made by the defendant in the criminal actions referred to (App. 5). The matter was argued to the Court on January 20, 1959 and was decided by the Court in an Opinion by Judge Bird with a separate concurrence by Judge Milliken, and a dissent by Judges Stewart and Moremen on May 22, 1959. (Copies of all of the Opinions are made a part of the appendix hereto, App. 17-35.)

III. THE OPINIONS OF MAY 22, 1959.

As has already been stated, the Opinion of the Court was rendered on May 22, 1959. Three separate Opinions were rendered at that time. The Opinion of the Court by Judge Bird, a separate concurrence by Judge Milliken, and a dissent by Judge Stewart joined in by Judge Moremen. A brief summary of each of those opinions follows, with general comments pointing out our agreement or disagreement with each which will be developed in detail later in this brief.

(A) The Opinion of the Court by Judge Bird.

The Opinion by Judge Bird commences with a statement of the underlying facts. It is significant that no mention is made in this statement of the fact that, when Owen expressed his desire to make a statement privately to Judge Curtis in chambers and asked that members of the press be excluded, Judge Curtis specifically stated at that point that, while the members of the press would be excluded, the statement to be made by Owen would be a public record which would be available to the press. (Thus, there is no promise to Owen for which a breach is sought here.) The Opinion then states that the statement was made and was taken down in shorthand by the Court stenographer. Again the Opinion in merely stating that the Judge and the court reporter refused Petitioner's request for a copy of the statement omits the fact that throughout the Judge continued to state that he was convinced that the statement was a public record and that the Petitioner should have access to it, but that he was troubled by the question of his authority to direct the reporter to transcribe the statement for the Petitioner. The Opinion deems it unnecessary to determine whether the statement (confession) is or is not a public record. It contends that, even if the statement is a public record, the Petitioner has no right to inspect the statement. The Court relies upon the case of *Fayette County v. Martin*, 279 Ky. 387, 130 S. W. 2d 838 (1939), as authority for this proposition. Before doing so, however, the Court states what it

calls the common-law rule of inspection from 45 Am. Jur., *Records and Recording Laws*, Section 17, pages 427-428. This is, according to the Court, that every person is entitled to inspection of judicial records providing he has an interest therein which is such as would enable him to maintain or defend an action for which the document or records sought can furnish evidence or necessary information. The Court then states that this rule was recognized and adopted in *Post-Dispatch Co. v. Circuit Court of Cole County* v. *Martin, supra*. On this basis the Court holds that the Petitioner, not having the requisite right of inspection as relating to the defense or maintenance of an action, has no right to the relief sought.

As will be developed more fully below, it is respectfully urged by Petitioner that the Opinion is in error for the following reasons:

1. It gives no recognition to the significant and controlling facts that the confession was part of the judicial proceedings and was relied upon by the Court in sustaining the motion for a new trial and in granting the new trial which resulted in the change of the defendant's sentence from death to life.

2. It gives no recognition to the fact that the defendant was advised at the time the press was excluded that any statement or confession made by the defendant would be a public record subsequently available to the press.

3. It gives no recognition to the fact that Judge Curtis never changed his opinion that the confession was a public record available to the

press but that his difficulty concerned whether he had the authority to order the court stenographer to prepare a transcript at Petitioner's cost.

4. It mistakenly asserts that the common-law rule requires an interest in a public record sufficient to maintain or prosecute a legal action, when the very authority quoted points out that this rule has not been adopted generally in America.

5. It mistakenly asserts that the restrictive common-law rule was adopted by this Court in *Fayette County* v. *Martin*, *supra*, when in truth that case did not rely upon or adopt the restrictive common-law rule, but held that the issue of inspection there was controlled by statute, even if it was conceded that the common-law rule was as stated by the parties thereto.

6. It completely and mistakenly omits reference to the contention advanced by Petitioner that the denial of the right of inspection here is a deprivation of the public right to have criminal trials publicly and openly held, absent some overwhelming consideration necessary to the furtherance of the administration of justice for which no contention has been made here.

7. It overlooks and mistakenly omits any reference to the contention advanced by Petitioner that the action of the lower court here constitutes censorship of press report of judicial proceedings, and as such violates the rights of freedom of the press guaranteed by the United States and Kentucky Constitutions.

(B) The Concurring Opinion by Judge Milliken.

Judge Milliken concurs in the conclusion of the majority on the grounds that there was no public record to which the Petitioner had the right of access, and that it was within the discretionary power and right of the trial court not to require the transcript to be made of a criminal case should take place under the public eye, but states that the constitutional right of a public trial is a safeguard to the rights of the accused and not for the right or benefit of anyone else. He also concedes that publication of the proceedings taken at the trial of a criminal case comes within the broad term of freedom of the press. However, it is Judge Milliken's position that not everything that transpires in court is a public proceeding and that where the defendant is represented by counsel, the rights of the defendant and the rights of the public are satisfied. It is Judge Milliken's position that the matters that occurred in chambers were merely preliminary to the action that occurred in open court and as such did not constitute judicial proceedings. He further states that as a matter of fact, the defendant probably believed that the press would not be given access to his statement and that to give the press access would be requiring Judge Curtis to break faith with the defendant. Judge Milliken quotes *Wigmore On Evidence*, Volume 8, Section 2376, as authority for the proposition that communications to a Judge in the nature of confessions are privileged. He then con-

cludes that the question of press access to the confession here lies within the discretion of the trial court and that mandamus does not lie to control a trial court's discretion.

It is respectfully submitted that Judge Milliken's Opinion is in error for the following reasons:

1. It mistakenly asserts that the right of a public trial is a right accruing to the accused alone and that neither the public nor anyone else has any benefit or interest in this right.

2. It mistakenly states that the defendant believed that the press would not be given access to his statement, contrary to the uncontested facts in this record that the defendant was advised when the press was excluded that any statement made by the defendant would be a public record and available to the press.

3. It mistakenly asserts the rule from *Wigmore* as applying to confessions made to a judge in a case upon which the judge was sitting, when, in fact, the rule quoted from *Wigmore* applies only to situations where information of a confidential nature is conveyed to a judge in a matter which is not before him.

(C) The Dissenting Opinion of Judge Stewart Concurred in by Judge Moremen.

This Opinion first states the facts and points out that the entire proceedings herein occurred when the motion for a new trial in place of the trials which resulted in the death sentences for the defendant, Owen, came before the Court for hearing. Judge Stewart noted that Judge Curtis, Owen, counsel for Owen and the Commonwealth Attorney accompanied by the official court reporter retired from the courtroom to the Judge's chambers where Owen made a statement which was taken down by the official court reporter. Shortly thereafter, all of the parties returned to the courtroom where a jury was impaneled. The Opinion then notes that the Assistant Commonwealth's Attorney, Laurence Higgins, then informed the jury that Owen had confessed and had changed his plea of "not guilty" to "guilty" to both murders, and upon the recommendation of Higgins the jury in each case fixed the punishment of Owen at life imprisonment. Judge Stewart notes that the record does not reveal when Judge Curtis sustained Owen's motion for a new trial on his first convictions, but that it was bound to have been after Owen made the confession in chambers and before the juries fixed his punishment on his changed plea of "guilty." The Opinion notes the uncontested evidence that at the time Judge Curtis excluded the press from his chambers he notified the members of the press in the presence of Owen and counsel for both sides that any statement Owen might make would be

a matter of public record and would be available to the press. It then points out that subsequently Judge Curtis again assured the press that a transcript of Owen's statement would be prepared for dissemination to the public, but that thereafter Judge Curtis changed his mind and refused to allow the official court stenographer to make a transcript available.

Judge Stewart then turns to the Opinion of the Court by Judge Bird. He points out that that Opinion does not determine whether the confession made by Owen is or is not a public record. Nevertheless, it holds that even if such a statement is a public record, the Petitioner has no right to mandamus by authority of the case of *Fayette County* v. *Martin, supra,* and 45 Am. Jur., *Records and Recordings Laws,* Section 17 pages 427-428.

Judge Stewart then points out that the Majority Opinion erred in his opinion when it stated that *Fayette County* v *Martin* adopted the restrictive-common-law rule as being applicable to the general right to inspect public records in this jurisdiction. Judge Stewart then examines *Fayette County* v. *Martin* and points out that that case dealt with a question of whether or not a statutory enactment allowed the inspection sought there. He points out that in *Fayette* v. *Martin* the Court conceded for the sake of argument that the Petitioners there had the stated required common-law interest. The Court there, therefore, had no occasion to, and did not determine, what right of inspection a member of the public had who, perhaps, did not possess the restrictive-common-law legal in-

terest. Nowhere in *Fayette* v. *Martin*, according to Judge Stewart, was the asserted common-law right adopted as the rule of Kentucky. The language in *Fayette County* v. *Martin* with reference to the rule, according to Judge Stewart, must, therefore, be regarded as dictum.

Judge Stewart then turns to a discussion of the case of *Barrickman* v. *Layman*, 154 Ky. 630, 157 S. W. 924 (1913), and quoting from that case points out that he believes that *Fayette County* v. *Martin*, *supra*, said no more than *Barrickman* wherein it was pointed out that it was unnecessary to determine the common-law rule pertaining to the right of inspection since in the case before the court the citizen and taxpayer had shown the requisite interest. Judge Stewart then notes that in the very next section of American Jurisprudence after the one cited by Judge Bird for the majority, it is pointed out that the restrictive common-law rule referred to in *Fayette County* v. *Martin*, and in the Opinion by Judge Bird, has not been generally observed in this country. 45 Am. Jur., *Records and Recording Laws*, Section 18, page 428.

Judge Stewart then holds that the transcript here is a public record and that newspapers as members of the public, and because of the fact that they are engaged in the business of gathering and publishing news, have a legitimate interest in judicial or public records entitling them to a reasonable inspection of such records. The Opinion then quotes from an early decision of Oliver Wendell Holmes, then a Judge of the Supreme Court of Massachusetts, in the case of

Cowley v. *Pulsifer*, 137 Mass. 392, 394, which emphasizes the extreme importance and need for full disclosure of all that transpires in criminal proceedings. The opinion then points out that the principles stated in this case were approved of by the Kentucky Court in *Paducah Newspapers* v. *Bratcher*, 274 Ky. 220, 118 S. W. 2d 178 (1937).

Judge Stewart then concludes that the confession made in Judge Curtis's chambers was made upon the hearing for a motion for a new trial, after which and upon which Judge Curtis evidently granted a new trial. As such it was part of the court record and became a public record to which any member of the public was entitled to a transcript. Finally, Judge Stewart concludes that the proceedings carried on by Judge Curtis below, with every good motive, if allowed to stand, place the Kentucky courts but one step from "Star Chamber" proceedings in a free country where our Constitution guarantees a public trial. If a court may decline to make court proceedings public at the request of the accused, there is nothing to prevent its doing so at the prosecutor's request or on the Judge's own volition. Thus, what was intended by the framers of our Constitution as a benefit to the accused may be used to his great disadvantage. It seems to him a system could evolve whereby the general public could be excluded from knowledge of what transpires at any or all criminal trials. Judge Stewart would then grant the Writ of Mandamus prayed for.

It is submitted that the opinion of Judge Stewart correctly states the result required in this case and should be adopted by the court.

IV. ARGUMENT.

In its Petition for Writ of Mandamus herein and in its argument and memoranda in support thereof, Petitioner posed five legal questions for the Court. Only two of these questions were alluded to by the Court in the Opinion of Judge Bird. Because Petitioner sincerely believes that the Court erred in its rulings upon the two questions which were considered by it, and because of the Court's failure to give consideration and guidance in its Opinion concerning the other three questions posed, Petitioner deems it necessary to fully explore in this portion of its Brief the arguments in support of Petitioner's position on each of the questions.

The questions are:

(1) What documents and records constitute public records?

(2) What right exists in the general public and in newspapers in particular, to have access to, to copy, and to inspect public records?

(3) What right does the general public have in the constitutional and common law guarantee of a public trial?

(4) To what extent does the constitutional guarantee of freedom of the press grant to newspapers and their representatives access to the proceedings and records of criminal trials?

(5) Is mandamus the appropriate relief for a denial of any of the foregoing rights by a trial judge?

Petitioner believes that the authorities discussed below will conclusively demonstrate the validity of the following answers to the foregoing questions:

(1) Records of all that transpires in a judicial proceeding, including the proceedings taken down by the official court stenographer in chambers which are referred to in subsequent proceedings in open court, and which were apparently relied upon by the court in granting the motion for a new trial in a case involving two of the most heinous crimes ever committed in the State of Kentucky, are public records.

(2) Any member of the general public having a legitimate interest therein has a right to inspect or copy public records, and those engaged in the business of gathering and publishing news have such a requisite interest enabling them to inspect public records either under the restrictive common-law rule which has never been generally adopted in this country or upon the broader majority rule.

(3) The right of public trial guaranteed by the constitution and common-law in all jurisdictions in this country is the right not only of the accused but the right of the public generally, and any member of the public having an interest therein, such as a newspaper in the business of

gathering and disseminating news, has standing to enforce this right.

(4) The constitutional guaranty of freedom of the press extends to the newspapers, in the exercise of their rights under that guaranty as members of the general public, the right to learn and to publish all facts concerning what transpires in our courts, and a denial of the right of newspapers to learn of such facts and to publish news concerning them is a denial of the constitutional guaranty of freedom of the press, absent special limitations where the administration of justice specifically requires that such denial be made.

(5) In the event any of the foregoing rights are denied or interfered with by a Circuit Judge in any jurisdiction of Kentucky, the sole and appropriate remedy for one whose rights have been denied is a Petition to the Court of Appeals of Kentucky for a Writ of Mandamus.

Before engaging in a discussion of the specific questions and answers just referred to, Petitioner deems it necessary to discuss the authorities relied upon in the Opinion by Judge Bird and to cite to the Court several recent decisions in other jurisdictions which ought to be controlling precedent here.

A. The Ancient and Discredited Common-Law Rule Limiting the Right of Inspection of Public Records to Those Individuals Having an Interest in Such Records as Would Enable Them to Maintain or Defend an Action For Which the Document or Records Sought Can Furnish Evidence or Information Has Never Been Adopted in Kentucky.

Reduced to its bare essentials, the Opinion by Judge Bird relies upon two authorities in denying to Petitioner the relief sought. Both of these authorities are deemed by Judge Bird to stand for the same proposition; *i. e.*, that the common-law rule requires an interest such as would enable a person to maintain or defend an action for which the document or records sought can furnish evidence or necessary information. The Opinion cites 45 Am. Jur., *Records and Recording Laws*, Section 17, pages 427 and 428, as authority for this proposition.

It must first be noted that this rule as stated in the foregoing section of American Jurisprudence is referred to as the English common-law rule. At the very outset that authority notes that in England the rule was developed in the context where inspection was sought to secure evidence in a pending or prospective suit. It is then pointed out that the rule is:

> "Not so much a denial of the right of every citizen to inspect the public records and documents, as a declaration of the interest which a private individual must have to avail himself of the extraordinary writ of mandamus to enforce his right. In theory the right is absolute, yet in practice it is

so limited by the remedy necessary for its enforcement that it can be denominated only 'a qualified right'."

This language, which was also contained in the Court's Opinion, is most significant. It points out, first, that the rule as developed was not intended to be restrictive but was intended to relax the law and help litigants. Secondly, it points out that the rule really was concerned not with a determination of the extent of the right, which is conceded to be absolute, but with the determination of when the extraordinary remedy of mandamus would be available. This is particularly significant as will be shown in the discussion of the case of *Nowack* v. *Fuller*, 243 Mich. 200, 219 N. W. 749 (1928). This case is cited in American Jurisprudence as the first authority for the proposition stated in Section 17 and for the discussion which we have just made of this proposition. Inasmuch as the points we have just made are made in the *Nowack* case, it is clear that the meaning to be attached to the quotation is the meaning given in the *Nowack* case and asserted by us here, rather than the restrictive meaning attached to this language by Judge Bird's Opinion.

Because of the importance of this question to the decision here, we will now discuss the *Nowack* case fully. This case involved a suit for a writ of mandamus brought by a newspaper to require a state auditor to permit the newspaper to inspect records regarding the expenditure of public money. The newspaper suit was brought by the editor and publisher of the paper and it was alleged that in good faith and for a public pur-

pose the newspaper desired to have the records inspected and to publish a true and fair statement of the expenditures revealed by the records. It was further alleged, as here, that access was denied and that this denial hampered and injured the newspaper in its business. The Court pointed out that in Michigan, as is the case in Kentucky, the right to inspection, if it existed, was dependent upon the common-law rule since there was no statute providing for the inspection of state public records. The Court then passed to a consideration of whether there were any common-law rules relative to the right of citizens to inspect public documents and records. The Court stated:

> "*If there be any rule of the English common law that denies the public the right of access to public records, it is repugnant to the spirit of our democratic institutions.* Ours is a government of the people. Every citizen rules. . . . *There is no such law and never was either in this country or in England.* Mr. Justice Morse was right in saying:
>
> > 'I do not think that any common law rule ever obtained in this free government that would deny to the people thereof the right of free access to, and public inspection of, public records.' Burton v. Tuite, 78 Mich. 374, 44 N. W. 285, 7 L.R.A. 73.
>
> "There is no question as to the common-law right of the people at large to inspect public documents and records. The right is based on the interest which citizens necessarily have in the matter to which the records relate.

"There remains to be considered the common-law right of the individual citizen to inspect public records, in which he has an interest in addition to his interest as a member of the general public. In the elaborate note to State *ex rel.* Wellford v. Williams, 64 L.R.A. 419, where the English cases are discussed, it is said:

> 'In England, by the common law, the right of inspection is very guardedly granted by the courts after a consideration of the purpose for which it is desired. Thus it has been denied when the inspection was desired for private, rather than public, purposes.'

"It will be noted by reference to the English cases that the courts were seldom called upon to enforce a private individual's right to inspect public documents and records, except where the inspection was desired to secure evidence in a pending or prospective suit. Accordingly, there was formulated the following common-law doctrine

> 'At common law, every person is entitled to the inspection, either personally or by his agent, of public records, including legislative, executive, and judicial records, provided he has an interest therein which is such that would enable him to maintain or defend an action for which the document or record sought can furnish evidence or necessary information. 23 R. C. L. 160; 34 Cyc. 592.'

"When the procedure which was used for the enforcement of the citizen's right to inspect public records is recalled, it will appear that the doctrine above quoted is not so much a denial of the right to inspect as it is a declaration of the interest which a private individual must have to avail him-

self of the remedy for the enforcement of his right. At common-law, the individual citizen as a member of the public had a right to inspect; but, if inspection was refused, he could only enforce his right by mandamus proceedings instituted in his behalf by the Attorney General. He could not sue out the writ in his own name. Originally the writ of mandamus was a prerogative writ, supposed to proceed from the king himself, who sat in his Court of King's Bench; and it was formely allowed only in cases 'affecting the sovereign or the interests of the public at large'. In time, the right to the writ was extended to the private individual.

"But mandamus is based on interest, and the individual was not allowed to sue out the writ in his own name, unless he could show some special interest to be enforced; that is, some interest different from his interest as a member of the public. The courts held that, to entitle him to the writ, his interest must be direct and tangible, and that the right to inspect public records to secure evidence for a lawsuit was such an interest. By this the courts did not mean that he had no right to inspect the books unless he wanted to use them as evidence; but they meant that they would not issue the extraordinary writ of mandamus to enforce a private right of inspection, unless the purpose was to use it in some pending or prospective suit. *The rule adopted amounts to a restriction on the citizen's remedy rather than on his rights.* As a citizen and taxpayer; he had the right of inspection; but, when he wanted to use it for private purposes, his right was restricted by the limited remedy which the courts allowed him for its enforcement. He had a naked right, for the enforcement of which the law provided no remedy.

"This rule adopted by the English courts has no basis in reason or justice. It is absurd to hold that a man could inspect the public records, providing his purpose was to use the information in some litigation, and to deny him the right to inspect for some other purpose that might be equally beneficial to him. It does not protect all of his substantial rights and has not been received with general favor in this country. In 18 R. C. L. § 160, p. 237, it is said:

> *'So in this country mandamus will lie to enforce a citizen's right to inspect public records, irrespective of whether it is sought in aid of pending or contemplated litigation with respect to his personal rights.'* Citing Clement v. Graham, 78 Vt. 290, 63 A. 146, Ann. Cas. 1913E, 1208; State v. Williams, 110 Tenn. 549, 75 S. W. 948, 64 L. R. A. 418; Ferry v. Williams, 41 N. J. Law, 332, 32 Am. Rep. 219; also see State v. King, Auditor, 154 Ind. 621, 57 N. E. 535" (*Id.* at 750-751). (Emphasis added.)

After discussing the derivation of this right of inspection further the Court then stated as follows:

> "In order to maintain it (the right to inspection) he must show he has a special interest not possessed by the citizens generally. *Apart from his public interest, his petition shows that he has been hampered and injured in his business by the refusal of the defendant to allow him to inspect the records in his office. This is a special interest. Is it a sufficient interest to entitle him to the aid of this court by writ of mandamus? We think so. He is the manager and editor of a newspaper.* It is published and circulated in Michigan. He sells news to the people through the medium of

his paper. In a proper and lawful manner, he has a right to publish matters of public interest. The citizens and taxpayers of this state are interested in knowing whether the public business is being properly managed. By denying him access to the public records for the purpose of securing such information, he is deprived of legal rights for which he is entitled to redress by the writ of mandamus." *Id.* at 751-752. (Emphasis added.)

We have set forth the *Nowack* decision in such detail because it so conclusively demonstrates the proper construction to be put upon the language from 45 Am. Jur., *Records and Recording Laws*, Section 17, which is quoted by the Court. However, it is not necessary to rely upon this language from the *Nowack* case alone, for in the very next section of American Jurisprudence, it is pointed out that the rule stated in Section 17 is the English common-law rule and that that rule has not been generally observed in this country:

"Even in the absence of statute, it is asserted in some cases that there is no question as to the common-law right of the citizens at large to inspect public documents and records. *The English common-law rule* that an inspection of public documents could be had by a private person only where he showed some legal interest to be subserved by the desired inspection, and that he could not prosecute a civil action to redress wrongs growing out of the misconduct of public officers, *has not been generally observed in this country. It is not essential that the interest of a person desiring to inspect public documents be private and capable of sustaining a suit or defense in*

own personal behalf. That common interest which every citizen has in the enforcement of the laws and ordinances of the community wherein he dwells has been held to entitle a citizen to the right to inspect the public records in order to ascertain whether the provisions of the law have been observed" (45 Am. Jur., *Records and Recording Laws*, § 18, page 428). (Emphasis added.)

This then leads us to a discussion of the case of *Fayette County* v. *Martin*, *supra*, which was also relied upon by the Court in the decision by Judge Bird. At the outset it should be pointed out that *Fayette* states the restrictive English common-law rule just alluded to. In *Fayette* the statement is taken from 53 C. J. To begin with, as we have already pointed out, the rule so stated has not been generally adopted in this country. Secondly, the rule so stated is a British rule that is completely meaningless, and if it has any meaning at all it pertains to the description of the remedy rather than to the description of the right, as pointed out in the language from *Nowack* v. *Fuller*, *supra*. Finally, it should be noted that the language quoted from 53 C. J., *Records*, section 40 at page 624, imposes no limitation upon the right to inspect. This language sets out the broad common-law rule which has been accepted in American Jurisdictions. The very language quoted by the Court in Judge Bird's Opinion sustains this contention. In addition to the language quoted by the Court a further reading of the material in Corpus Juris on this subject reveals the following:

". . . and there is authority that, in the absence of limitation or restriction in a statute providing for the preservation of specified public records, it will be assumed that it was intended that such records should be subject to examination by any and all persons interested in the subject matter." (*Id.*, Section 40 at page 624).

"Further, it has been held that all persons have a right to resort to public records, strictly speaking, irrespective of motive or interest and even to satisfy idle curiosity . . . ." (*Id.*, Section 40 at page 625).

". . . that under the common-law in this country every person is entitled to free access and public inspection of public records without any showing of special interest in the absence of a statute public records are open to inspection by the public" (*Id.*, Section 40 at page 624 citing *Nowack* v. *Fuller*).

In this same authority, there is a discussion of which members of the public have the right to inspect public records. With reference to this point, after stating the restrictive English common-law rule, it is stated as follows:

". . . but a pending action suit, or proceeding is generally held not necessary for this interest to exist. This interest need not be private, and it exists where the person seeking inspection may by reason of his relation to the common interest, act as the representative of a common or private right" (*Id.*, Section 43 at page 628).

Finally, with specific reference to the type of inspection sought here it is stated as follows:

> "It has been held that *in the absence of a statute the publisher or editor of a newspaper has the right to inspect public records* to acquire material for the purposes of his business of gathering news. . . ." (*Id.*, Section 48 at page 631).

Similar disposition can be made of the language quoted in *Fayette*, *supra*, from 23 R. C. L. It is true, as the quote sets out, that in 23 R. C. L. the restrictive English common-law rule is set forth. However, a few pages further on in this old volume it is pointed out in the following language that this restrictive rule does not obtain in this country:

does not obtain in this country:

> "The English rule has not been generally observed in this country, and from an early period the courts have exercised a large discretion in annulling the illegal acts of municipal bodies and officers and compelling the performance of their public duties at the instance of citizens and taxpayers who were not otherwise interested in the controversy than was the rest of the community. . . . Under modern statutes and modern decisions, **the strong tendency of the courts is to permit** the examination of public documents by a citizen and taxpayer whether or not the applicant intends to institute legal proceedings" (*Id.*, Section 14 at page 164).

Finally, a much more recent examination of the right of inspection is contained in the latest revision of 53 C. J., we refer to 76 C. J. S., *Records*, where the following is stated:

"However, there is also authority that the contents of a public record office are open at the request of a person desiring to examine them on due application to the official in charge. *But under the common-law in this country every person has a right to free access and public inspection of public records without any showing of special interest*, and that in the absence of a statute public records are open to inspection by the public" (76 C. J. S., *Records*, Section 35 at page 134).

"The publisher or editor of a newspaper and his accredited representatives have the right to inspect public records to acquire materials for the purposes of the business of selling news . . ." *Id.*, Section 37f. at page 145. (Emphasis added.)

Thus, it is clear that the very authority cited by the Court and apparently relied upon as supporting the rule allegedly given in the decision in *Fox, supra*, do not sustain the rule. Indeed, they conclusively establish that the stated rule has not been adopted in this country.

An examination of the decision in *Fayette County* v. *Martin, supra*, also establishes that the rule was not adopted in that case. That case involved an action by Fayette County and the City of Lexington seeking a mandamus to compel the defendant, Commissioner of Revenue, to permit the plaintiffs and their agents to inspect and examine the annual franchise tax reports made to the commission by certain named franchise taxpaying corporations. The case was decided not upon the common-law rule but upon the provisions of the statutes enacted by the Legislature (KRS 411h-15, 411i-13). The reference to the com-

law rule, in that case, therefore, was pure dictum. Even if it was not dictum, however, there is no adoption of the rule. All that the case does is to state [illegible]

> [illegible] conceding these to be proper statements of the general common law rule invoked by appellants, declaring the public's right to inspect and examine all public records as which they possess the required interest, the next question arising and presented for decision is whether or not the appellants' asserted common-law right to inspect these records has been lost or qualified by the express inhibitions and provisions of the statutory enactment, Section 4114-13, and its later amendments" (*Id.*, at 843).

It is submitted, therefore, that the restrictive common-law rule was not adopted in *Fayette*, *supra*. It is further submitted, that even if the rule was adopted, it was error, since that rule has never been generally accepted in this country and that upon reconsideration this Court should join with the overwhelming majority of American jurisdictions and accept the more liberal prevailing rule allowing the right of inspection to any citizen having an interest therein.

In passing, it should be noted, that even if this Court were to adhere to the restrictive common-law rule, that the Petitioner here possesses the requisite interest in terms of necessity for the defense or prosecution of a suit. The prospect of libel actions is an important consideration for those engaged in the newspaper business. A newspaper is bound to print the truth. If it does not, it exposes itself to the serious

consequences of an action for libel with the subsequent punitive damages involved. The only way this Petitioner could protect itself against any libel actions growing out of the publication of the contents of the confession which was made in the Court's chambers which contents were known to Petitioner's representatives and divulged to them by other parties would be to actually obtain the confession since other persons were supposedly named in that confession. Without actually being allowed to examine the stenographic transcript of the confession Petitioner runs the full risk of libel in reporting the substance of the confession. Surely this risk qualifies Petitioner with the interest of defense or prosecution of an action which is required under the more restrictive English common-law rule.

B. The Weight of Authority in Those Jurisdictions That Have Had Occasion to Pass On the Question Presented Here Is That Petitioner Is Entitled As of Right to Have Inspection of the Stenographic Notes of the Confession Made by Owen and That the Writ of Mandamus Prayed For Should Be Granted.

Before turning to a specific discussion of the points referred to above, Petitioner feels that there are three decisions in other jurisdictions so closely in point on the question here that they should be accepted as controlling authority and precedent for the position urged by Petitioner.

The first of these is *In re Shortridge*, 99 Cal. 526, 34 Pac. 227 (1893). This early California case grew

out of divorce proceedings in which the Court made an order directing "that during the trial all persons be excluded from the courtroom except the officers of the Court, the parties, and their counsel." It was further ordered "that no public report or publication of any character of the testimony in the case be made." The stated basis for the order was that evidence that would probably be of a filthy nature would be introduced at the trial. On the day following the order, a newspaper published the purported testimony of the witnesses. These proceedings then grew out of contempt prosecutions which were initiated by the Court after the publication [illegible] of contempt by the lower Court and appealed to the Supreme Court of California. While the exclusion there dealt with the entire trial the principles enunciated are fully applicable to the attempt here to exclude the press and the public from a portion of the proceedings.

On appeal, the California Supreme Court reversed the action of the lower Court. The Court noted that California had a statute which permitted divorce actions to be tried in private with the exclusion of all persons except the parties, their counsel, their witnesses, and the officers of the Court. The statute provided that this rule of exclusion could be applied to the entire case or "in the exercise of a sound discretion during the examination of a witness."

In discussing the situation the Court stated as follows:

"In this country it is a first principle that the people have the right to know what is done in their courts. The old theory of government which invested royalty with an assumed perfection, precluding the possibility of wrong, and denying the right to discuss its conduct of public affairs, is opposed to the genious of our institutions, in which the sovereign will of the people is the paramount idea; and the greatest publicity to the acts of those holding positions of public trust, and the greatest freedom in the discussion of the proceedings of public tribunals that is consistent with truth and decency, are regarded as essential to the public welfare. That freedom has been abridged, such claim must find its support, if any there be, in some limitation expressly imposed by the law-making power, or the right to exercise the authority claimed must be necessarily implied as essential to the execution of the powers expressly conferred. We find no expression in the section referred to upon which such a claim can be based" (*Id.*, at 228-229).

The Court then made the following cogent statement:

". . . the public have the right to know and discuss all judicial proceedings, unless such right is expressly interdicted by constitutional or statutory provisions, or unless the publication prohibited by the order of the court is of such a nature as to obstruct or embarrass the court in its administration of the law and the execution of the powers expressly conferred upon it" (*Id.*, at 229).

The court noted that it was contended by counsel for the newspapers that secrecy and silence in such

judicial matters is utterly repugnant to the spirit of our institutions, and opposed to the constitutional declaration of right with respect to free speech and the liberty of the press. The Court then went to a final consideration of any jurisdiction for the trial court's order prohibiting publication of the testimony. It stated as follows:

> "How, then, could such an article interrupt the orderly conduct of a trial, or tend to induce a failure of justice? With the moral aspect of the case we have nothing to do. The courts are not concerned with the conduct and morals of the community. Such must proceed from the legislative department. It is argued with some plausibility that the publication of the testimony might deter timid and highly sensitive witnesses from making disclosures which they would make if assured that their utterances would not be given publicity. But this is an argument which would apply to all cases, and rests upon the erroneous assumption that a witness will violate his oath to tell the truth, and the whole truth, to save himself from the mortification incident to the relation and publicity of certain disagreeable facts within his knowledge. There is no real danger of such a result. The testimony which a witness gives in a court of justice is not the discussion of a topic voluntarily selected by him, and for which he may choose his language, and use chaste or unchaste words, regardless of the truth of the facts he is required to detail; and every witness is supposed to appreciate this fact, and to speak the truth without regard to the question who or how many will be informed of the proceedings" (*Id.*, at 230).

The foregoing language is particularly apt and pertinent here since it points out that, even in a case where moral considerations were operative, there is no justification for the court to prevent the press from observing a trial and reporting the events that occurred there. Here, Judge Curtis' ruling has the absolute effect of censoring what the press may report and preventing the press from making a full disclosure to the public of what transpired in a most serious case. In addition, in our case, we lack even the moral justification provided by the [illegible] *Shortridge* case. Here, no reason is given in justification of the exclusion of the press and the consequent denial of the right to print what transpired, except for some vague reference to a breach of faith with the defendant, Owen. As pointed out, *supra*, this vague reference has no basis in fact since the defendant was clearly advised at the time the press was excluded that any statement he would make would be a public record and would be available to the press.

More recently, the Ohio Court had occasion to consider this question in *E. W. Scripps Company, et al. v. Fulton*, Ohio, 125 N. E. 2d 896 (1955). This case involved a petition for a writ of prohibition or mandamus to prevent a trial judge from enforcing an order excluding all members of the public from the courtroom during the trial of a pandering and prostitution prosecution. In the case at issue the prosecuting witness had concluded her testimony in chief and was about to be subjected to cross-examination by counsel for the defendants. At the defendants' request an order ex-

cluding all members of the public from being present during the cross-examination was made by the court. It was claimed by counsel that they would be better able to compel the witness to tell the truth if they could cross-examine her in private, that is, if all members of the public, including newspaper reporters were excluded from the courtroom. When the Court heard this request, he obtained from the defendants signed written wavers of their right to a public trial and ordered the exclusion during that limited part of the trial. While the order of exclusion was in effect, the Petitioners, a newspaper publishing company and its employees, sought the writ in issue. The writ came up before the high court of Ohio after the case was over, but because of the important public questions involved, the Court determined to treat the matter as being in the nature of a declaratory judgment and passed upon the contentions raised by the parties. The facts in this case are absolutely comparable to ours. If anything, the facts are more adverse to the petitioner there than they are in our case since in the *Scripps* case the petitioner was seeking admission to the proceedings whereas here we do not now contest the court's right to exclude the petitioner and its representatives on a temporary basis, but seek only access to inspect the records of what transpired during the exclusion.

The Court discussed the appropriateness of the remedy of mandamus and noted that the only way a member of the public could establish his right to observe a trial in the courts of justice would be by seeking an action for declaratory judgment or an order

such as the writ petitioned for. The Court then held that the petitioners had the right to maintain the action and passed to a consideration of whether or not the trial judge had the power to conduct any part of the trial of one charged with a felony in secret. Phrasing the question a little more broadly, the Court stated that the issue was whether it was a necessary prerequisite in the administration of criminal justice that a trial of one charged with felony be a public trial where the public, with some discretionary limitations, may attend and observe the proceedings. The Court noted that the only reason for making the order "excluding the public from attending the trial was the demand of the defendants that a part of their case be conducted in secret. No question of the public morals, safety or health was advanced or considered in making the order of exclusion." This is exactly the situation we have here. The Court then stated as follows:

> "Courts are public institutions. They are maintained by the public as a necessary part of the process of government in maintaining order and adjudging the legal obligations and rights of the people. Judicial power in a criminal case is exercised by an action in the name of the state in which action all have a deep and abiding concern. Any suggestion that law enforcement has any private aspects as to the manner in which justice is administered is completely without foundation. *To permit trials of persons charged with felony to be held in secret, the order of secrecy being based entirely on defendants' request would take from the court its most potent force in support of the impartial administration of justice according to law.*

"A crime is a public wrong, one directly affecting every member of society and the trial of one charged with criminal conduct is for the determination of the question of whether the conduct of the defendant has violated the laws of the State enforced as a necessary part of maintaining the social order. . . .

"The community is deeply interested in the right to observe the administration of justice and the presence of its members at a public trial is as basic as that of a defendant whether such right be provided for in the Constitution or otherwise" (*Id.*, at 899). (Emphasis added.)

The Court then noted that the Ohio Constitution provided that Courts would be open and that a defendant is entitled to a public trial. The Court noted that this latter constitutional provision is one for the benefit of the defendant. It then stated:

"It does not, however, guarantee the defendant a private trial as against the public whose interests are equally involved in the judicious administration of the law.

"Historically, there is no foundation for the administration of justice in secret.

"The basis of the constitutional guarantee of an 'open court' is to be found in the development of the common-law and would be a recognized right of the people without constitutional sanction.

"*It can never be claimed that in a democratic society the public has no interest in or does not have the right to observe the administration of justice.* The open courtroom is as necessary and important in the interest of supporting the administration of justice as in the protection of the rights

of a member of the public when on trial for a criminal offense" (*Id.*, at 900). (Emphasis added.)

The Court then referred to an early New Hampshire case, *State* v. *Copp*, 15 N. H. 212, at 215, wherein it was stated "The law does not, indeed, authorize any court to act arbitrarily and unreasonably exclude persons *but the right to have the court open is the right of the public and not the individual*" (*Id.*, at 900. Emphasis added.)

The Court then traced the development of the right of public trial and pointed out its derivation in the common-law and in the comments of the early authorities with reference to the common-law. In essence, the Court indicated that the right existed independent of constitutional or statutory authority. Finally, the Court noted that there were cases which held that a defendant is privileged to waive *his* constitutional right to a public trial, and where he has waived such right he cannot thereafter complain. With reference to these cases, the Court stated as follows:

> "But the defendants cannot waive the right of the people to insist that the proceedings of the courts, insofar as practicable and in the interest of the public health and public morals, be open to public view. *In other words, a defendant has no right, constitutionally or otherwise, to a private trial; that is, one hidden from the public view*" (*Id.*, at 903; Emphasis added).

Finally, the Court concluded:

> "It is the duty of the trial judge to afford both the state and the defendant a trial in 'open court' " (*Id.*, at 903).

The Court then stated that the position advanced by the newspaper petitioner was the position of the public. It stated:

> "The trial of a criminal case is a judicial proceeding to be conducted in 'open court', and open to public view. The trial of a criminal case is a public matter; an action filed in the name of the State. The rights of representatives of the press can, however, rise no higher and by the same token, can be no less, than the rights of any other member of the public. . . . It might be suggested that since a great majority of the public, either because of lack of time or space limitations of the court room, or for lack of direct interest, are prevented or unable to attend judicial proceedings whereby their knowledge about such proceedings can be gained only through the work of news-gathering and disseminating agencies, and therefore, when judicious limitation of those attending a public trial is necessary, such fact should be considered in favor of allowing members of the press to attend. . . .
>
> * * *
>
> "From the agreed facts in this case, no question of public health was involved, nor could it be said that the public morals were given consideration or formed the basis of the order of total exclusion of the public from the trial and locking the court room doors while a part of the trial was in progress. Those attending in no way were disturbing the trial. The sole ground for the total ex-

sion was at the request of the defendants, it being claimed by them that if the members of the public were excluded, they might be able to make the witness 'tell the truth' or at least what their version of the truth might have been. Such a request cannot be justified and the order excluding the public from a public trial was, under the agreed facts of this case, without legal foundation" (*Id.*, at 904).

It should be noted that the opinion of the high court of Ohio in this case was unanimous. The facts of the case are so close to the facts in our case that the decision should be given great weight. This is particularly so in the absence of any countervailing authority dealing with comparable fact situations.

In a more recent decision, the New York Court, too, has had occasion to pass upon a similar question. This is particularly significant because this New York case, *New York Post Corporation* v. *Leibowitz*, 2 N. Y. 2d 677, 163 N. Y. S. 2d 409 (1957), was rendered subsequent to the decision of the New York Court in *United Press Associations* v. *Valente*, 308 N. Y. 71, 123 N. E. 2d 777 (1954). The *Valente* case has been relied upon by the Respondents here in support of their contention that the writ should be denied and that the leading authority is against the position contended for by the Petitioner. Additional weight must be given to the later *Leibowitz* decision because it was written by the same Justice who wrote the *Valente* decision.

The *Leibowitz* case grew out of proceedings for a writ requiring the official court stenographer to furnish

the petitioning newspaper with a stenographic transcript of a trial judge's charge to a jury. In 1955 a probationary police officer had been charged with manslaughter as the result of the fatal shooting of a 15-year-old boy. The case was tried before Judge Leibowitz, and as is the situation here, the case had received wide-spread newspaper publicity. After the jury had acquitted the defendant, the reporters for the petitioner's newspaper sought to obtain a copy of the Judge's charge to the jury. At first the court stenographer agreed to furnish it but later refused because the trial judge ordered him not to furnish it. The lower courts denied the relief sought and the question came up before the Court of Appeals in this proceeding. In a well-reasoned opinion the Court of Appeals unanimously reversed the lower courts and held that the newspapers were entitled to receive and obtain a copy of the court's charge to the jury from the official court reporter. The Court had the following to say:

> "We are all agreed that fundamental considerations of public policy demand that court proceedings in a publicly held trial be open to the fullest public scrutiny, so long as the case is not one in which preservation of secrecy in respect of the court records has been recognized by law. . . . It has been aptly observed that 'A trial is a public event' and 'What transpires in the court room is public property.' Craig v. Harney, 331 U. S. 367, 374, 67 S. Ct. 1249, 1254, 91 L. Ed. 1546. The function of publicity, especially in the form of newspaper reporting and comment, as 'an effective restraint on possible abuse of judicial power' is, indeed, one of the fundamental safeguards of

a free society. Matter of Oliver, 333 U. S. 257, 270, 68 S. Ct. 499, 506, 92 L. Ed. 682; see also Pearson Pub. Co. v. United States, 345 U. S. 504, 602, 73 S. Ct. 872, 877, 97 L. Ed. 1277 (*Id.*, at 412-413).

The Court then held that in its view the trial judge exceeded his power an undertaking to direct the stenographer not to furnish any transcript to the charge to the petitioner. It noted that while a statute existed giving the Court authority to direct the stenographer to transcribe his notes that there was nowhere in the statute of any authority to prohibit the stenographer from freely making transcripts of his notes available and that such authority cannot be held to be a necessary corollary of the power to direct transcription or an inherent attribute of the jurisdiction of either the Court or the judge. The Court then stated:

> "There is ample authority that relief in the nature of *mandamus* may be granted to compel a public body or officer to refrain from taking particular administrative action in contravention of a clear mandate of law, even though the immediate relief sought is of a preventive rather than an affirmative nature." (*Id.*, at 414).

The Court then turned to a consideration of whether the petitioner newspaper had a clear legal right to compel the stenographer to furnish a transcript of the charge to the jury. The Court made reference to the various statutory provisions pertaining to the office of court stenographer and its duties, and noted that these statutes did not decide the ques-

tion. It is further noted that it was urged that the stenographer's notes may not be regarded as records or other papers in a public office. The Court then stated that there was a public policy in favor of the fullest publicity of governmental action and that it required no straining to reach the conclusion that the office of an official court-appointed stenographer is a public office and that the stenographer's original stenographic notes may reasonably be regarded as public records. The Court then held that under the constitution, laws and general public policy the petitioners or any member of the public are entitled to obtain a transcript from the stenographer of the trial judge's charge to the jury upon payment of the prescribed fees. The Court then turned to respondent's decision in *United Press Assn.* v. *Valente* and stated that an entirely different issue was involved there which had little relevance to the case before it. It stated:

> "The question there presented was whether the right to a public trial in a criminal case could be independently invoked by persons other than the defendant, for whose protection that right was primarily provided, *as possible hostility to rights of the defendant exists.* In this case, on the other hand, there is no possible conflict between the position asserted by the petitioners and the rights of the defendant. Indeed, the trial has been concluded, and neither the defendant nor the People could in any way be prejudiced

It is submitted that the reasoning in the foregoing opinion is completely apposite to our situation. Judge Fuld, who wrote a vigorous dissent in the *Valenti* case, wrote a separate concurrence in this decision. As he had stated in the *Valenti* decision, he stated here as follows:

> "I do agree, however, that said constitutional and statutory provisions are but additional evidence that fundamental considerations of public policy of this State demand, except when the Legislature or court decisions have decreed otherwise, that all court proceedings in a publicly held trial be open to the fullest public scrutiny." *Id.*, at 118.
>
> "I am of the opinion that when any member of the public requests a verbatim transcript or a copy of the minutes of a public trial, it is not only the right but the duty of a judge of the court to approve such request and make the appropriate direction . . . . The request was reasonable, for newspapers are charged by law, when commenting on any judicial proceeding, to publish 'a fair and true report' . . . . The stenographer had first stood to furnish the notes, but then the judge 'excluded it. This was a clear abuse of judicial discretion as a matter of law.'" *Id.*, at 119.

It is submitted that the [illegible] without the additional collaboration lent by the discussion which follows, should without difficulty lead this Court to rescind the Opinion of May 22, 1959 and enter an Opinion granting the relief requested here.

C. **Judicial Records Are Public Records, and the Notes of the Official Court Stenographer Constitute Public Records which May Be Had by a Member of the General Public Such as the Petitioner.**

The Opinion of May 22, 1959, states that the Court does not decide whether or not the official stenographer's notes here are public records or judicial records. It is submitted that these clearly are public records and judicial records. The discussion in *New York Post* v. *Leibowitz*, *supra*, conclusively demonstrates that the stenographic notes of the official court reporter are such judicial records.

According to Black's *Law Dictionary*, page [illegible] (3d Ed.), a public record is:

> "A record, memorial of some act or transaction, written evidence of something done, or document considered as either concerning or interesting the public, affording notice or information to the public, or open to public inspection."

Among the cases cited in support of this definition is the Kentucky case of *Barrickman* v. *Lyman*, *supra*.

In this case, on a petition for rehearing, the Court of Appeals held that all records required by law to be kept as official records are public records, and are subject to inspection by the public. This comment was by way of explanation of the language in the original decision. The petition for rehearing is set out in 157 Ky. 710, 160 S. W. 267 (1913). In the original decision at 154 Ky. 630, 157 S. W. 924 (1913), the Court was faced with an action for mandamus upon the part

a citizen and taxpayer of the City of Louisville. She was attempting to inspect records on file in the office of the City Engineer of Louisville. Section 2775 of the Kentucky Statutes provided that the official papers and records of City officers are public records. The court held that the City Engineer was a public officer and that the records of his office are public records. The court then noted, as was pointed out *supra* in the discussion of *Fayette* v. *Martin*, and Judge Stewart's Opinion in this case, that,

> "Some of the older cases make a distinction between an examination of public records by the public in general and an examination by those having an interest in them, holding that in the latter case the right exists, while in the former it does not . . . it is unnecessary in this case to determine whether or not this distinction prevails in this State. It is sufficient to say that plaintiff is not only a citizen and taxpayer, but has shown an interest in the records in question" (*Id.*, at 926).

The court then held that the mandamus prayed for was the proper remedy.

In another case cited by Black in support of the definition, *People* v. *Harnett*, 226 N. Y. S. at 341, it is stated as follows:

> "A public record, strictly speaking, is one made by a public officer in pursuance of a duty, the immediate purpose of which is to disseminate information to the public, or to serve as a memorial of official transactions for public reference."

court stenographer here was a public officer and that his notes were public records. Here in Kentucky our statutes make the same sort of provision for official stenographic reporters, as did the New York statutes considered in the *Leibowitz* decision. K.R.S. 28.410, for example, provides that each Circuit Judge may appoint an official stenographic reporter for his court or division. K.R.S. 28.420 requires that the reporter take an oath to faithfully discharge the duties of his office before appointment and that this qualification shall be entered upon the order book of the court. K.R.S. 28.430, provides for the furnishing of transcripts upon the requests of the parties, and provides for the presiding Judge to direct the reporter to take full stenographic notes of the proceedings if the Judge believes the testimony should be transcribed. In the same section it is provided that in Counties with a population of 150,000 or more "the reporter of the criminal branch of the Circuit Court shall take down the proceedings in all cases." K.R.S. 28.440 fixes the compensation of the official court reporters in Circuit Courts in Counties having a population of 150,000 or more. K.R.S. 28.470 makes the transcript prepared by the official reporter a part of the record in the Court of Appeals in any case taken to the Court of Appeals. K.R.S. 28.500 gives the reporter the authority to issue subpoenas for witnesses, to compel the attendance of witnesses, and to administer oaths in the same manner as provided by law for Notaries Public. This Court has had occasion to establish the fact that the official court stenographer is a public officer. In *Love* v.

Duncan, Ky., 256 S. W. 2d 498 (1953). It was so held. In sum, the situation is exactly comparable to that before the court in the *Leibowitz* case.

On the basis of the foregoing, it is clear that the stenographic notes of the court reporter are a written memorandum of official proceedings, and as such are public records under either statutory definitions or the common law.

D. Newspapers and Their Representatives Have the Common-law Interest to Entitle Them to Inspection of Public Records.

It has already been pointed out *supra* that all of the authorities indicate that the interest required at common-law to inspect public records is just the interest of any citizen in the affairs of government. It has been pointed out that the opinion in *Fayette* does not hold to the contrary, and that opinion insofar as it is interpreted as citing a contrary rule from American Jurisprudence, Corpus Juris, or Ruling Case Law misinterprets the statements of those authorities.

The case of *Nowack v. Fuller*, *supra*, conclusively establishes that the proper common law rule is that contended for here, and that a newspaper engaged in the business of gathering and disseminating news has the requisite common law interest to inspect public records. This case does not stand alone, the overwhelming mass of authority is in support of the propositions so succinctly stated in the quoted material, *supra*.

In *Schmedding v. May*, 85 Mich. 1, 48 N. W. 201 (1891), a newspaper petitioned for a Writ of Mandamus against a County Court Clerk to require the Clerk to allow inspection of the records and file books of the County Court. In that case no proceedings had yet occurred in open court, and nothing had transpired other than the filing of the suit. The Court had the following to say:

> "After a public trial or hearing, and a final determination of a cause entered upon the journal of the court, no one would probably question the right of any person to inspect that record, and publish the result. Such record has undoubtedly then become a public one. . . . In this country, courts are open to the public. It is said in Cowley v. Pulsifer, 137 Mass. 392: 'It is desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed' " (*Id.*, at 202).

In *Read Publishing Company v. Hamer*, Ore., 244 Pac. 868 (1926), a newspaper publisher petitioned for a Writ of Mandamus to require the clerks of the County and Circuit Courts to allow the newspaper representatives access to the records and files in those courts for the purpose of securing and preparing matter for newspaper publication. The usual allegations

were made concerning the nature of the Publishing Company's business. The Court granted the petition for a Writ of Mandamus, stating:

> "To those persons only who have occasion to examine the records for some lawful purpose, and not for mere curiosity, will a Writ of Mandamus be granted. . . . . From the allegations contained in the petition, it appears that the petitioner sought to examine the records for a lawful purpose, and it is therefore entitled to a Writ of Mandamus in the enforcement of its right" (*Id.*, at 870).

In *Holcombe* v. *State*, Ala., 200 So. 739 (1941), a newspaper publisher petitioned for a Writ of Mandamus to require the County Sheriff to permit the newspaper and its representatives to inspect records concerning prisoners received in the County jail. The Court held that these records were public records and then stated as follows in upholding the petition for a Writ of Mandamus:

> "We conclude by saying this court holds: (1) that the public generally have the right of a reasonable and free examination of public records required by law to be kept by public officials, except in instances where the purpose is purely speculative or from idle curiosity, or such as to unduly interfere or hinder the discharge of the duties of such officer.
>
> * * *
>
> "We further hold (2) persons engaged in the publication of newspapers have such an interest in the public records of public officers, as to entitle them to a due or reasonable inspection of such

public records. The function of the press in gathering information for the public to enable public affairs to be intelligently discussed is of great importance.

* * *

"The general rule on the subject is stated in 53 Corpus Juris, p. 631, as follows: 'It has been held that in the absence of a statute the publisher or editor of a newspaper has the right to inspect public records to acquire material for the purposes of his business of selling news, . . .'" (*Id.*, at 746-747).

That Court then went on to quote extensively the same language from *Nowack* v. *Fuller*, and *Bend Publishing Company* v. *Haner* cited *supra*.

The *Nowack* case has been cited as the leading authority on this common law right of inspection in a more recent decision in the federal courts, *McCoy* v. *Providence Journal Co.*, 190 F. 2d 760 (1st Cir. 1951).

In this case a newspaper publishing company and others brought action in the federal court to require the City Treasurer of a city in Rhode Island to allow them to inspect the tax records of that city. The ground for relief urged upon the court was the Fourteenth Amendment to the United States Constitution and the provisions of the judicial code giving the federal courts jurisdiction for deprivations under color of state law of any privilege or immunity secured by the federal Constitution to its citizens. After holding that it had jurisdiction, ***the court referred to the case of Nowack v. Fuller as the leading American case on the common-law right of the people at large to inspect***

public documents and records and quoted with approval the language as set out therein.

In *Disabled Police Veteran's Club* v. *Long*, Mo., 279 S. W. 2d 220 (1955) the court had before it the question of the right to inspect the rolls of disabled pensioners under the police retirement system of the City of St. Louis. The court held that these records were public records and then citing the Wisconsin case of *International Union* v. *Gooding, supra*, stated as follows:

> "Independently of statute, the term 'public records' covers not only papers expressly required to be kept by a public officer, but all written memorials made by a public officer within his authority where such writings constitute a convenient, appropriate, or customary method of discharging the duties of the office. . . . .
>
> "Generally, any writing or document constituting a public record is subject to inspection by the public . . . Nor is it essential that the inspection of public records be limited to persons who have some legal interest to be subserved by the inspection. . . . And the right to inspect carries with it the right to make copies" (*Id.*, at 223).

The right of inspection and the denial of secrecy desired at the request of one of the parties to an action was upheld by the Court of Customs and Patent Appeals in the decision of *In re Mosher*, 248 F. 2d 956 (C.C.P.A. 1957). In that case, the court quoted from an earlier decision the following language:

> ". . . any attempt to maintain secrecy over the records of the court would seem to be incon-

sistent with the common understanding of what belongs to a public court of record, *to which all persons have the right of access, and to its records, according to long-established usage and practice*" (*Id.*, at 958, emphasis supplied by the court).

The Court says that the foregoing is the general rule stating:

> "Such an interpretation is consistent with what we feel to be the majority and better rule at common law in regard to judicial records. . . .
>
> "'An inspection of the records of judicial proceedings, kept in the courts of the country, is held to be the right of any citizen.'
>
> * * *
>
> "*Thus it is clear that at common law, no special interest had to be shown for a member of the public to gain access to judicial records, at least as far as a majority of the courts were concerned. Access to such records was held to be an unqualified matter of right*" (*Id.*, at 958-959; Emphasis added.)

Not only is the overwhelming weight of court decision in accord with this generally established right of inspection, most of the authorities that have had occasion to pass on this proposition also are in accord. In 14 Am. Jur., *Courts*, Section 148 at page 354 it is stated:

> "After a public trial or hearing and a final determination of a cause entered upon the journal of the Court, no one would probably question the right of any person to inspect that record and publish the result. Such record has undoubtedly then become a public one. In this country courts are open to the public."

See also 76 C. J. S., *Records*, Section 35 at page 133, Section 35(a) at pages 133-134, where the *Nowack*, *McCoy* and *Disabled Police Veteran's Club* cases are cited as authority, and Section 36, on page 140, wherein it is stated:

> "Generally speaking, it is the right of every person to inspect the records of judicial proceedings."

Further, Section 37, at page 145, wherein it is stated that publishers, editors and reporters have the right to inspect and acquire materials for the business of selling news, citing the *Holcombe* case. Reference is also made to the opinions of the Attorney General of Kentucky in letters dated August 16, 1951 and October 1, 1958, which were referred to in the original memoranda herein, and in which were stated the opinion of the Attorney General of Kentucky that the English common-law rule has not been followed in this country and that under the authority of *Nowack*, *Holcombe*, *Bond*, *supra*, newspapers and their representatives have a special interest stemming from the business of gathering and selling news which entitles them to the right to inspect public and judicial records.

Finally, it is submitted that the language in *Paducah Newspapers* v. *Bratcher*, *supra*, makes it clear that this court has previously deemed newspaper reports of judicial proceedings so important that the denial here would be a complete negation of the rights emphasized in that decision. In that decision the court

pointed out that the entire development of the law of privilege in libel actions stems from

> ". . . the general advantage to the country in having these proceedings made public (which) more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings" (*Id.*, at 179).

It is submitted then that the foregoing cases conclusively demonstrate that judicial records are public records and that newspapers have the right, as do other members of the public, to inspect such records without the showing of any special interest related to the defense or prosecution of suits. On this basis alone the relief petitioned for should be granted.

E. The Exclusion of the Press Here and the Refusal to Subsequently Allow the Press to Learn What Transpired in Chambers, Constitutes a Denial of the Public Right in a Public Trial in Violation of the Fourteenth Amendment to the United States Constitution and in Violation of Sections 2, 8, 11 and 26 of the Kentucky Constitution and the Common-Law.

The historical importance of the right to a public trial is so well established that Petitioner will not unduly prolong this brief with authority in its support. An examination of the cases reveals that rarely have the courts had occasion to pass upon the nature of this right in a context where the question was posed by someone not a party to the original proceedings. For this reason, most of the cases dealing with the right to

a public trial deal with it in the context of the right of the accused. This is understandably so.

In many of these cases there is repeated reference to earlier authorities as standing for the proposition that the right is the right of the accused alone. An examination of these authorities reveals that they were intended in no way to limit the nature of the right in that manner.

This examination was necessarily made by the courts in deciding the cases of *Scripps Company* v. *Fulton*, and *In re Shortridge*, *supra*, where both of those Courts announced that the right to a public trial is a right not only of the accused but of the public in general.

We direct the Court's attention again to the fact that almost without exception in those cases where the rule is stated as being for the protection of the accused there was no issue presented as to whether the general public had any right to enforce the rule. In addition, almost without exception the authority for the statement in those cases is attributed to the following unsubstantiated language by Judge Cooley in volume 1 of his *Constitutional Limitations* at page 647, wherein he stated:

> "The requirement of the public trial is for the benefit of the accused . . ."

Perhaps the most concise statement of the origins and development of this right of the public to insist upon public trials is contained in the dissent of Judge Froessel in *United Press Assn's.* v. *Valente*, *supra*. We,

therefore, will take the liberty of borrowing liberally from that statement (*United Press Assn's.* v. *Valente*, 123 N. E. 2d 777 at 786-789).

As stated above, this right of the public to attend a criminal trial like the right of an accused defendant to a public trial, stems from the ancient heritage of the common law. There is an early indication of this public-right concept in Sir Edward Coke's analysis of the phrase "In curia domini regis", as used in Statutum de Marleberge enacted in the year 1267, some fifty-two years after Magna Charta (52 Hen. 3: 6 Halsbury's Statutes of England, pages 135-138 (2d ed.)). Coke stated with reference to that phrase "These words are of great importance, for *all causes* ought to be heard, ordered and determined before the judges of the kings courts *openly* in the kings courts, whither *all* persons may resort." (Coke, Second Institutes, Vol. I, page 102 (1797), emphasis added.)

In 1649, some 400 years later, after a stirring plea by John Lilburne, then on trial for treason, the gates of the court trying him were opened. Lilburne stated:

> "I have something to say to the court about the first fundamental liberty of an Englishman in order to his trial; which is that by the laws of this land all courts of justice ought to be free and open *for all* sorts of peaceful people *to see, behold, and hear, and have free access unto* . . . . and yet, sir, as I came in, I found the gates shut and guarded, which is contrary to law and justice." (Trial of John Lilburne, Haw. St. Tr. 1270, 1273-74 (Commission of Oyer & Terminer, England (1694) Emphasis added.)

It is true that Lilburne spoke as a defendant, but the concept of the public's right to attend "to see, Behold and hear" was rapidly spreading, for this was but eight years after the Long Parliament abolished the Court of Star Chamber. (*Matter of Oliver*, *supra*, at 266-267).

At about the same time in 1641, the Massachusetts Bay Colony enacted "The Massachusetts Body of Liberties" within which is found the following passage showing the open-court principle then viewed as a public right:

> "Every man whether Inhabitant or forreiner, free or not free shall have libertie to come to any publique Court, Councell, or Towne meeting." (Colonial Laws of Massachusetts (1889), reprinted from 1660 ed. pages 29-68, particularly 35.)

Support for this concept is also found in the writings of those giants of the common law, Blackstone, Hale, Jenks, Bishop, Halsbury and Bentham, as follows: Blackstone's *Commentaries*, Book 3, p. 373 ("in the presence of all mankind"); Hale, *History of the Common Law of England*, 6th ed. (1820), ch. XII, p. 343 (in the presence of "all by-standers"); Jenks, *The Book of English Law*, 3d ed., 1932, p. 91, ("public have free access"); 9 Halsbury's *Laws of England*, Section 705, ("As a general rule all persons have a right to be present in court (with recognized exceptions) . . . it does not appear that a judge trying a criminal case has any power to exclude the public in general"); 6 Bentham, *Rationale of Judicial Evidence*, page 355 (Bowring's ed. 1843), ("Without publicity, all other

checks are insufficient; in comparison with publicity all other checks are of small account.")

More recently, Professor Wigmore in his treatise has commented upon the reasons for the maintenance of free public access to the courtroom. These reasons as stated by Professor Wigmore are other than and apart from those advanced for the protection of individual defendants in individual cases. Wigmore states that open proceedings serve to improve the quality of justice by improving the quality of testimony; that under the public gaze the officers of the court will be moved to a stricter "conscientiousness in the performance of duty"; that persons not parties who may in some way be affected by what transpires in the court will thus have an opportunity of learning of the proceedings and be enabled to protect themselves; that the "educative effect of public attendance is a material advantage"; and finally, and perhaps most importantly for our case, that "*not only is respect for the law increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy*". (6 Wigmore on Evidence, Section 1834 (3d ed.), emphasis added.)

This concept of the public right to a public trial has often been stated by the courts. The leading case in England is *Scott* v. *Scott*, A.C. 417 (1913). This case is cited in Halsbury, *Laws of England*, p. 161 (2d ed. 1933), as supporting the principle that "as a general rule all persons have a right to be present in court". *Scott* was a divorce action in which the Privy Council

of the House of Lords, sitting as the high court of England, fully discussed the concept of the public right to a public trial. At page 438 that Court stated:

> "The mere consideration that the evidence is of an unsavory character is not enough, any more than it would be in a criminal court, *and still less is it enough that the parties agree in being reluctant to have their case tried with open doors*." (Emphasis added.)

In that same case, Lord Atkinson, in a concurring opinion, noted that a public trial might be painful or humiliating to the parties and the witnesses or that the details might be so indecent as to tend to injure public morals and then stated:

> ". . . but all this is tolerated and endured because it is felt that in public trial is to be found, on the whole, the best security for the pure, impartial and efficient administration of justice, the best means for winning public confidence and respect."

Thus, it will be seen that the British authorities, which also stem from the common law, sustain the concept of the public right in a public trial.

In this country the Sixth Amendment to the Federal Constitution, which reflected the existing common-law, provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." The Fourteenth Amendment provides "nor shall any State deprive any person of life, liberty or property without due process of law." Our Supreme

Court has held that this due process clause makes it improper for a State court to sentence a person to prison without a "public trial", a process akin to that to which the guarantees in the First Amendment have become binding on the States. *In re Oliver*, 333 U. S. [illegible] (1948).

General language declaratory of the right to a public trial is found in several Supreme Court decisions. In *Craig* v. *Harney*, 331 U. S. 367, at 374 (1946), the following is found:

> "We start with the news article. A trial is a public event. What transpires in the court room is public property. . . . There is no special perquisite of the judiciary, as distinguished from other institutions of democratic government, to suppress, edit or censor events which transpire in proceedings before it."

In *Maryland* v. *Baltimore Radio Show*, 338 U. S. 912, at 919-920 (1949), it is stated:

> "Safeguards for the fair administration of criminal justice are enshrined in our Bill of Rights. Respect for both of these indispensible elements of our constitutional system presents some of the most difficult and delicate problems for adjudication when they are before the Court for adjudication. It has taken centuries of struggle to evolve our system for bringing the guilty to book, protecting the innocent, and maintaining the interests of society consonant with our democratic professions. *One of the demands of a democratic society is that the public should know what goes on in courts by being told by the press what happens there*, to the end that the public may judge whether

Emphasis added.)

In the *Oliver* case, supra, at page 271, it is stated:

> "The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power. . . . Without publicity all other checks are insufficient; in comparison of publicity, all other checks are of small account."

In the same case, it is noted in footnote 29, at page 272, as follows:

> "No Court has gone so far as affirmatively to exclude the press. Note, 55 Mich. L. Rev. 474, 476."

In Kentucky, in addition to the right of a public trial in Section 2, Section 14 of the Kentucky Constitution provides "all courts shall be open." This is similar to the provision found in the New York law which was relied upon by Judge Frossel in *Valente* and which was specifically relied upon in the leading decision of *New York Post v. Leibowitz*, *supra*, and in the decision in *People v. Adler*, 308 N. Y. 50, 123 N. E. 2d 769, at 771 (1954).

It is noted in those New York opinions that the provision there with reference to courts being open was declaratory of the existing situation at common law in 1829. In other New York cases, that court had occasion to discuss the rationale for allowing newspapers the privilege of reporting fairly what occurs in court trials, and the meaning of the provision. In

Lee v. *Brooklyn Union Publishing Company*, 209 N. Y. 245, 248, 103 N. E. 155, 156 (1913), it was stated:

> "The obvious reason is the public interest in having proceedings of courts of justice public, not secret, for the greater security thus given for the proper administration of justice.
>
> "For that reason, it was early provided by statute in this state that the 'the sittings of every court within this state, shall be public, . . .' The public generally may not attend the sittings of the courts, but they may be kept informed by the press of what goes on in the courts. . . ."

In another New York case, *Rudd* v. *Hazard*, 266 N. Y. 302, 307, 194 N. E. 764, 765 (1935), the Court stated:

> "Publicity, not secrecy in arraignment, plea, and judgment is part of our tradition. It is deemed necessary, not only for individual security, but also in the public interest."

It is clear then that the public possesses the right to attend trials in open court and that this right is twice bestowed, first by the heritage of the common law, and again by the express provisions of our Kentucky and United States Constitutions. It is true that some cases have held that a defendant may waive his right to a public trial, but in none of those cases, as we stated above, was the public's right in issue. As Judge Froessel points out in his dissent in *Valente* at page 788, in none of those cases was it "held that a defendant may waive the *public's* right to attend a court sitting."

References to situations where a defendant may waive a personal right are not relevant. This is so because those rights in each instance are found to be solely the defendant's right. In none of those instances, can it be found that a separate parallel right was given to the general public as the common-law and the Constitutions provide here.

It is obvious then from the foregoing that there is a public right to a public trial and that this right may not be waived by the defendant for the public. To hold otherwise would allow in the administration of our criminal courts the introduction of myriad abuses. See: Comment, *Public Trial in Criminal Cases*, 52 Mich. L. Rev. 128 at 135 (1953), in which it is stated that the popular notion that the right of a public trial is primarily for the benefit of the accused has no historical support. That authority contends that the public has a right in a public trial and that:

> "The basis of such a right in the public is a recognition of the fact that the people have an interest in knowing how the judicial system is functioning and seeing that the accused is given a fair and impartial trial and that the prosecution is accorded a proper opportunity to present its case."

See also Note, *Criminal Law — Public Trial — Enforceable Right in Members of the Public*, 40 Minn. L. Rev. 711 at 717, wherein it is stated:

> "Broadly speaking, all of the basic criminal procedural rights to a public trial, are for the benefit of the public because they are available for the protection of those members of society who

may never be accused of a crime as well as those who are."

Similar language is found in the article, *Publicity of Proceedings—Courtroom Barred to Public*, 6 Cath. U. L. Rev. 175, at 179 (1957), wherein it is stated:

"While the cases reiterate the fact that the press has no greater right to be present at the trial than the general public, a large body of case law has been built up which indicates that a fourth estate has been created. This is an institution of special privilege and is accorded a most solicitous preference over the general class of the public in disseminating news. Publicity of the proceedings is calculated to secure the same advantages as would be obtained through personal attendance.

* * *

"*The preservation of the right to public trial is of prime importance both to the individual and to the community at large.* Today there can be found little precedent which affirms a sweeping order of exclusion. The test should be whether or not the judicial power has been abused. *The defendant only under extenuating circumstances should be able to waive his right but not to demand absolute exclusion of the public* since that power lies only with the court. *Finally it is offered that the court should recognize a special interest which the press carries and it should not be excluded unless absolutely necessary.*" (Emphasis added.)

In the article, *Right of Public to Attend a Criminal Trial*, 31 N. Y. U. L. Rev. 611 (1956), it is stated:

"Although the history of the origin of the guarantee of a public trial in criminal cases is obscure,

there is some evidence that it originally developed for the benefit of the public rather than for the defendant. In England the practice apparently was to hold trials in public long before any concern developed for the rights of a defendant in a criminal trial and prior to public arousal to the abuses of the English Star Chamber, the Spanish Inquisition and the French *Lettres de Cachet*."

In the article, *Right of Public to be Admitted to Criminal Trial Over Objections of Accused*, 13 Wash. & Lee L. Rev. 199 at 204 (1956), it is stated:

"The flaw in trusting a trial judge with power to exclude the public in the interest of justice in a particular case is that his opinion as to whether privacy will serve the interests of justice may be faulty. If that is true, by excluding the public he might as likely enable defendant to defeat adverse justice as to attain favorable justice. Because of the danger of faulty judgment by trial judges the rule should be nearly absolute that the public be admitted."

Finally, perhaps the outstanding commentary on the right of public trial is Radin, *The Right to a Public Trial*, 6 Temp. L. Q. 381 (1932), which has been cited repeatedly by courts in this country. At p. 392 of that article the author states that a public trial is a privilege of the public as well as of the defendant and that citizens have a right to know how the law operates and must not be deprived of this opportunity. Radin points out that one of the most important elements in the public right to a public trial is the public interest in

seeing and knowing that justice is done and that the prospect of public attendance helps to assure this.

It is submitted then that the exclusion of the press here at the request of the defendant was a violation of the public right to a public trial. The petitioner does not contend that there are no occasions when the public may be excluded, indeed it recognizes that for compelling reasons on rare occasions there may be temporary exclusion of the public. No such reasons are offered in this case and in their absence the general policy considerations demanding the widest publicity to public trials must overweigh the defendant's request.

F. The Refusal to Allow the Petitioner and Its Representatives to Obtain a Copy of the Stenographic Notes of the Confession Here Is a Denial of Petitioner's Freedom of Press Under the Fourteenth Amendment to the United States Constitution and Under Section 8 of the Constitution of Kentucky.

We have already referred to the provisions of the Fourteenth Amendment and to the provisions of the Constitution of Kentucky which guarantee the rights of Freedom of the Press. The Freedom of Press guaranteed by the First Amendment to the United States Constitution is applicable to State action by virtue of the due process clause of Fourteenth Amendment to the United States Constitution. *Burstyn Inc.* v. *Wilson*, 343 U. S. 495, at 500 (1952). The exclusion order of the respondent as a judge of a Kentucky court is "State action." *Shelley* v. *Kraemer*, 334 U. S. 1 (1948). It needs no citation of authority to establish that the First

Amendment to the Federal Constitution has thus been consistently applied to State cases involving freedom of the press. See *Near* v. *Minnesota*, 283 U. S. 697 (1931); *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936); *DeJonge* v. *Oregon*, 299 U. S. 353 (1937).

The courts have on innumerable occasions specifically stated that the guarantee of freedom of the press is designed to aid the public in formulating an opinion on matters in which it has an interest. Thus, in *Grosjean, supra*, at p. 250, it is stated:

> ". . . since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of publicity afforded by a free press cannot be regarded otherwise than with grave concern. . . . it (the tax in question there) is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device . . . to limit the circulation of information to which the public is entitled by virtue of the Constitutional guarantees. A free press stands as one of the great interpreters between the Government and the people. To allow it to be fettered is to fetter ourselves."

This right of press freedom, therefore, is based upon and derived from the public right of access to information. It is clear that the right to receive opinions and information is as important as the right to utter them, and that the right to know facts is as important as the right to disseminate them. The Supreme Court of the United States has repeatedly recognized that the public's essential liberty of freedom of the press must

be protected in all its aspects. It is held that no meaningful distinction can be made between the act of publication and the act of distribution or circulation of the publication. *Lovell* v. *Griffin*, 303 U. S. 452 (1938).

Following this reasoning it is apparent that no meaningful distinction can be made between the right to obtain the information and the right to publish it. Indeed, the importance of the sources of information has been explicitly recognized by the Supreme Court:

> "That Amendment (the First) rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society" (*Associated Press* v. *United States*, 326 U. S. 1, at 20 (1945).

It is not just the press that has the right to be free from the fetters of press censorship but it is also the public that has this right of freedom from censorship and the right to circulation of information. *Grosjean*, *supra*. This right to information is of greatest consequence when the matter involved is a matter of great public concern and interest. This was recognized in *Bridges* v. *California*, 314 U. S. 252 (1941), wherein the court stated at p. 268:

> "It must be recognized that public interest is much more likely to be kindled by a controversial event of the day than by a generalization, however penetrating, of the historian or scientist."

Basically, the First Amendment guarantees the public the right to know, and the right to know is meaningless without access to information and ideas. Designed to insure that the public receive information, it does not distinguish between the crucial first step of obtaining the information and the subsequent steps of publication, circulation and discussion which, together make for an alert and well informed public.

Here, an examination of the situation indicates that Judge Curtis has played the classic role of censor. He has acted as a self appointed guardian of the rights of the poor defendant without offering any explanation or reason for such action. Indeed, the only explanation offered is faithful performance of a promise which the record shows was never given.

It is difficult to conjure up a clearer example of censorship. Judge Curtis' action has resulted in preventing the petitioner from publishing information and the public from receiving it on a series of events which *prima facie* are most questionable, in a matter which was the subject of widespread public interest. The courts have repeatedly pointed out that any attempt at censorship or previous restraint, must be justified by exceptional reasoning.

The courts have been quick to protect the Constitutional guarantees enunciated in the Bill of Rights, against attempted censorship by the legislature time and again. They must with equal vigor protect these rights against attempted censorship by the courts. Protection of the fundamental rights upon which our nation rests requires a self restraint exercised by the

judiciary as well as a judicial check on the legislature. Our democracy can not survive if the determinations of our rights are left to the vagaries of individual judges. We can not help but again refer to the statement of the Supreme Court in *Craig* v. *Harney*, *supra*, at 374:

> "*A trial is a public event. What transpires in the courtroom is public property.* . . . Those who see and hear what transpired can report it with impunity. *There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to supress, edit or censor events which transpire in proceedings before it.*" (Emphasis added.)

The judicial censorship exercised in this case constitutes a clear threat to a free society. It strikes at the paramount public right of access to information on matters of public interest without which our society can not stand.

The threat here should not be ignored because of the transitory importance of this case, or because the trial of the accused has concluded. Unless Judge Curtis' arbitrary action is rejected by judicial decision, it will stand as an invitation to judicial censorship in future cases. We submit that Judge Curtis, and other members of the judiciary, must be compelled to exercise restraint, regardless of their personal predilections, if we are to retain our fundamental liberties.

G. The Writ of Mandamus Is the Appropriate Remedy Here and Petitioner Has Standing to Request It.

Section 110 of the Constitution of Kentucky states that the Court of Appeals "shall have power to issue such writs as may be necessary to give it a general control of inferior jurisdictions." Almost everyone of the cases cited in this brief dealing with the question of the right of inspection of public records or the right of public trial and the presence of members of the public arises in a mandamus proceeding. This is appropriately so since there is no other practical method of securing relief. While some suggestion has been made in this case that some other method should have been pursued it is hard for the Petitioner to understand the meaning of this suggestion. No other method could secure relief from the action of Judge Curtis since no authority other than the Court of Appeals could order the necessary relief. Without again referring to the specific holdings on the right of mandamus in the cases previously cited, reference need be made only to controlling precendents here in Kentucky for this proposition.

In *Commonwealth* v. *Berry*, 29 K.L.R. 234, 92 S. W. 936 (Case 3, 1906), a Circuit Court entered an order appointing a stenographer to take testimony before a grand jury. The Commonwealth Attorney moved to rescind the order and the court refused. The Commonwealth Attorney then applied to the Court of Appeals for a writ of mandamus. In that decision the Court noted that Section 110 of our Constitution gives

the Court of Appeals the power to issue writs necessary to control inferior jurisdictions and that the writ of mandamus may issue when the inferior jurisdiction is proceeding out of its jurisdiction or proceeding erroneously and where remedy by appeal is inadequate.

In *Commonwealth* v. *McCrone*, 153 Ky. 296, 155 S. W. 369 (1913), mandamus was requested to compel a fiscal court to approve a county judge's selection of a road engineer. The circuit court refused mandamus and dismissed the suit. The Court of Appeals then entered on a discussion of whether the actions of the fiscal court are legislative or ministerial as against judicial. The court noted that if the actions of the fiscal court were judicial in nature then mandamus was an appropriate remedy to require a judicial officer to proceed properly.

Perhaps the conclusive authority on this point is *Motch* v. *Middlesboro*, 242 Ky. 653, 47 S. W. 2d 56 (1932). This was a case involving a petition for mandamus against the City and City officials to allow the plaintiff to inspect the records and books of the City and to audit them. There the Court appropriately stated the position contended for by the Petitioner here as follows:

> "If appellants have the right to inspect and audit the books of the city, and that right has been denied, there can be no doubt that mandamus is the appropriate remedy" (*Id.*, at 56).

It is apparent then that as a practical matter the only court having jurisdiction to reverse Judge Curtis

is the Court of Appeals. It is further apparent that the Petitioner here had no standing to reach the Court of Appeals to obtain the necessary relief by any method other than an original action for mandamus in the Court of Appeals. It is submitted that the authorities and discussion *supra* demonstrate that the denial of the right to inspect and copy the stenographer's notes and the absolute exclusion of the press here is not a matter properly within the exercise of the discretion of Judge Curtis. That being so, there can be no question but that mandamus is the appropriate remedy and that the Petitioner is entitled to have the writ issued.

V. SUMMARY.

The Opinion of May 22, 1959 Should Be Rescinded and the Petition For a Writ of Mandamus Granted. To Deny the Writ Would Be to Reverse the Common Law and to Establish a Precedent in Kentucky in Violation of the Fundamental Rights of Inspection of Public Records, the Public Right to Attend Public Trials, and Freedom of the Press.

Counsel for the Petitioner in this Brief has stated as strongly and as thoroughly as possible the authorities and precedents which we deem are controlling. In all sincerity we state to the Court that we wish we could have made our position apparent in a shorter Brief. The seriousness and significance of the issues, however, the wide-spread concern in Kentucky and other areas with the narrow rule and precedent of this decision, and the difficulties inherent in asking a Court

to change an opinion, necessitated the exhaustive treatment attempted. For burdening the Court with a Brief of this length, we apologize, but we know that the Court will understand and appreciate its motivation.

We are convinced that a fair reading of the points and authorities set out herein can lead to but one result. The Petition For a Writ of Mandamus must be sustained and the Opinion of May 22, 1959 should be rescinded on this Petition for a Rehearing.

Respectfully submitted,

WYATT, GRAFTON & GRAFTON,
300 Marion E. Taylor Bldg.,
Louisville 2, Kentucky,

WILSON W. WYATT,
ARTHUR W. GRAFTON,
EDGAR A. ZINGMAN,
Counsel for Petitioner.

ORDER OVERRULING PETITION FOR REHEARING

Orders—Kentucky Court of Appeals
Spring Term—June 24, 1960

Courier-Journal & Louisville Times Co., v. Curtis, Judge, et al., In C. of A.

The Court being sufficiently advised, it is considered that the Petition of Petitioner for a rehearing be and the same is overruled.

FILE COPY

OCT

JAMES P.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term

No. 44.

COURIER-JOURNAL & LOUISVILLE TIMES P

vs.

L. B. CURTIS, Judge Jefferson Circuit Court, Criminal Branch Second Division, Jefferson County, Kentucky, and JAMES M. YODER, Clerk Circuit Court Stenographer Jefferson Circuit Court Criminal Branch Second Div. Jefferson County, Kentucky

Respondents.

BRIEF FOR RESPONDENTS.

INDEX.

PAGE

Counter-Statement of Question Presented 1

Counter-Statement of the Case 3

Reasons for Denying the Writ 5

No Important Question of Federal Law Is Presented.

Conclusion 10

CITATIONS.

PAGE

Atlanta Newspaper, Inc. v. Grimes, ——— Ga. ———, 114 S. E. 2d 421 8

Craig v. Harney, 331 U. S. 367 9

Grosjean v. Am. Press Co., 297 U. S. 233 10

Maryland v. Baltimore Radio Show, 338 U. S. 912 ..... 5, 9

In re Oliver, 333 U. S. 257 8

Wigmore on Evidence, Vol. 8, §2376 7

KRS 421.100 6

IN THE

Supreme Court of the United States

October Term, 1960

No. 442

COURIER-JOURNAL & LOUISVILLE TIMES, *Petitioner,*

v.

L. R. CURTIS, Judge Jefferson Circuit Court, Criminal Branch, Second Division, Jefferson County, Kentucky, and JAMES M. YODER, Official Court Stenographer, Jefferson Circuit Court, Criminal Branch, Second Division, Jefferson County, Kentucky, *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

BRIEF FOR RESPONDENTS

COUNTER STATEMENT OF QUESTION PRESENTED

The Petitioner states that the question presented is whether the sole evidence upon which a State Court set aside a conviction and death sentence for two heinous and brutal murders may be kept secret by that State Court in violation of the public right in public trials and the freedom of the press guaranteed

by the Fourteenth Amendment. This does not correctly state the question.

There had been no death sentence. The accused filed a motion for a new trial after a verdict of guilty in which the jury fixed the punishment at death on one of the charges. There was no evidence heard on the motion to set aside the verdict and no secret hearing on that motion. After the accused announced in open Court he would change his plea from not guilty to guilty, he requested permission of the Judge to make a statement or ask a question in confidence before entering his plea (App. *, p. 15).* This was done in the presence of counsel for the Commonwealth and for the accused.

The only question involved is whether the Judge having heard, in confidence and in the presence of counsel, a statement or question, which was not a part of the trial, was obliged to have a transcript made of this confidential statement for the benefit of the Petitioner.

*The record has not been printed. The references are to the appendices attached to the Petition.

COUNTER-STATEMENT OF THE CASE.

The crimes were committed on December 31, 1957. At the trial for one of the crimes in May, 1958, there was a verdict of guilty and the jury fixed the sentence at death. Before any judgment was entered, the accused made a timely motion for a new trial which was passed from time to time by consent of counsel until January 12, 1959.

At that time, in open Court, the Judge was informed that there had been conferences between the Commonwealth's attorney and counsel for the accused, and that the accused wished to change his plea from not guilty to guilty.

The accused, an individual of sub-normal mentality (Petition, p. 6), asked permission to make a statement or ask a question of the Judge confidentially before entering his plea. Thereupon, the Judge and counsel for both parties retired to the Judge's chambers. The accused objected to the presence of newspaper reporters at the time he made his statement and they withdrew.

Following this, in open Court, the accused pleaded guilty to the charge of murder in both cases, and on the recommendation of the Commonwealth's attorney, the jury fixed the penalty at life imprisonment.

The Judge considered that he should listen to the accused, who had first pleaded not guilty and now wished to change his plea, in order to make certain

that the accused understood what his plea would mean (App. B, p. 15).

The record does not disclose what was said in chambers. In fact, it was not a part of the record because on a plea of guilty in open Court, when accepted, there was nothing left to be done except to permit the jury to fix the penalty.

Two days later, on January 14, 1959; the Petitioner filed in the Court of Appeals of Kentucky its Petition for Writ of Mandamus against the Respondents without joining the accused and asked for an immediate hearing

> "because the news value and interest of the Petitioner and the general public is immediate and will be completely and totally destroyed by any delay or protracted extension of these proceedings" (App. B, p. 5).

On Thursday, January 15, 1959; the Respondents were notified that the Court of Appeals would hear arguments on Tuesday, January 20, 1959. There was no time to take testimony, and the record only discloses the conflicting allegations in the pleadings and affidavits as to what took place.

The Petitioner argued that a confession had been made to the Judge in chambers and that such confession was "apparently relied upon by the Court in granting the motion for a new trial" (App. A, p. 2), but the Petition for writ of Mandamus does not so allege (App. B, pp. 2-5).

The Respondents denied that the accused had made a confession in chambers and alleged that the Judge permitted the accused to make a statement in chambers because the Judge wished to be sure the accused, who had theretofore pleaded not guilty, understood what his plea of guilty would mean (App. B, pp. 13-15). It is admitted that the plea of guilty was made in open Court (App. B, p. 3).

The Petitioner demanded an immediate hearing because the news value would be completely destroyed by delay (App. B, p. 5) with the result that no evidence was taken. There is no evidence, but only the contention of the parties as to what took place.

REASONS FOR DENYING THE WRIT.

This is not a case in which important constitutional questions can well be decided. The record is cloudy on the facts. Because the Petitioner demanded an immediate argument in the Court of Appeals there was no time for taking testimony (*Maryland* v. *Baltimore Radio Show*, 338 U. S. 912, 918).

The Judge was in position to know the facts. He felt he was not privileged to violate the confidence placed in him in a matter which in his judgment did not constitute a part of the record. The accused objected to his confidential statement being made available to the press (App. B, pp. 7-8).

The Petitioner admits that it already knows the substance of what took place in chambers. It says the "contents were known to Petitioner's representa-

tives and divulged to them by other parties" (App. C, p. 37). It wants the facts spread on the record so that it will not incur any risk of damages for libel in making the publication. It says:

> "The prospect of libel actions is an important consideration for those engaged in the newspaper business * * *. The only way this Petitioner could protect itself against any libel actions growing out of the publication of the contents of the confession which was made in the Court's chambers (which contents were known to Petitioner's representatives and divulged to them by other parties) would be to actually obtain the confession since other persons were supposedly named in that confession" (App. C, p. 37).

The Petitioner contends that the Judge must violate the confidence solely for the purpose of protecting it against a libel action which has not been filed although the statutes provide that a newspaper cannot be required to disclose in any proceeding the source of any information procured by it (KRS 421.100). It says that confidential information given to a Judge is not privileged although confidential information given to a newspaper is privileged.

The Respondents have no interest of their own to serve. The only rights involved here are the rights of the accused, who was not a party to the Mandamus proceedings. The Judge considered he was honor-bound to treat as confidential that which had been told him in confidence since in his opinion, the statement was not a confession and was not a part of the record.

It will not do to refer to the Judge's conduct as "this arbitrarily imposed huggermuggery" (App. C, p. 4). In doing only that which a judge considers to be his duty, he is at great disadvantage in being made a litigant.*

The alleged fact that the crimes for which the accused was being tried were "two of the most heinous crimes ever committed in the State of Kentucky" should not prevent the Judge from being just as fair to such a defendant as to any other defendant. A judge should not deny rights to a defendant charged with a heinous crime. A judge is not a mere referee. If he has no discretion, then he has no responsibility. The sanctity of the Court is important.

The Judge had the discretion to decide whether the confidential statement made to him was a part of the record. As pointed out in the concurring opinion of Judge Milliken of the Court of Appeals of Kentucky (App. B, pp. 23-24), such an eminent authority as Mr. Wigmore in his work on Evidence (Vol. 8, § 2376) said:

> "But is there not a distinct principle, by which communications in the nature of confessions, or similar confidences, made privately and not in open court, by parties who are implicated in a wrong or crime and desire guidance for their course of action, are privileged from disclosure by him, at his option? No obstruction to the course of justice

*Counsel for the Respondents were not counsel for the accused and appear herein for the Respondents at the request of the Louisville Bar Association.

can be apprehended by allowing such confidences to be preserved. The necessity and propriety, for the administration of justice, of assuring official confidence to informants desiring to unburden themselves is even plainer when a judge is the repository of that confidence, than in the case of prosecuting officials. The judge is indeed the most appropriate person to represent the Law's confessor."

If the Judge has no discretion then the constitutional right contended for here would sustain the right of a television station to make a television transcript of the trial (*Atlanta Newspapers, Inc.* v. *Grimes*, —— Ga. ——, 114 S. E. 2d 421). If the Constitution guarantees the right to report all proceedings in connection with a lawsuit, what about a psychiatrist's examination of a defendant or the proceedings before a Grand Jury, or the conferences between the Commonwealth's attorney and the counsel for the accused?

The authorities relied upon are not in point. This case does not involve the right of the accused to a public trial.

In re Oliver, 333 U. S. 257, involved the sending of a man to jail for contempt of a "one man grand jury" as authorized by Michigan law. He was given no chance to enjoy the benefits of counsel, no chance to prepare a defense, no opportunity to cross-examine or to refute the charges aaginst him. Clearly, this was a violation of the Fourteenth Amendment as the court held. However, it did not involve the right of a newspaper in anyway to require the Judge to break con-

fidence with defendant and counsel as is the issue here. Thus, the case is not in point.

Craig v. *Harney*, 331 U. S. 367, clearly is not in point for no one has been held in contempt of any court order. There a newspaper was held in contempt for publishing articles about a trial. The case held that this is fair comment and could not be restrained by the Court. Here the Court has made no effort to restrain the newspaper's articles about the trial. The newspaper has commented to its heart's content. Thus, the issue is simply not the same.

Maryland v. *Baltimore Radio Show*, 338 U. S. 912, is an opinion upon the effect of a denial of certiorari. Here again fines were imposed, because the respondents were held guilty of contempt for broadcasting over certain radio stations matter relating to one Jones who was then in custody charged with murder. The Maryland Supreme Court reversed the findings because the judgments of contempt violated the First and Fourteenth Amendments as to freedom of speech and freedom of the press. The United States Supreme Court denied certiorari upon the petition of the State of Maryland. Justice Frankfurter's opinion deals mainly with the fact that denial of certiorari does not really determine a holding of the Supreme Court as it may be denied for various reasons not pertaining to the merits. Thus, the case does not deal with the issue at hand as it is not the issue one way or the other. Here the Trial Court has not attempted to stop in any manner anything the newspapers are saying or want to say about the matter.

Grosjean v. American Press Co., 297 U. S. 233, deals with special taxes levied on newspaper advertising revenue based on circulation. Certainly, that question is not involved for here there is no effort to muzzle the press or put it out of business by excessive taxation.

If the Fourteenth Amendment deprives a trial Judge of all discretion as to whether he can maintain a confidence under the circumstances of this case, then it also deprives the Legislature of any discretion to determine whether other public records, such as tax returns may be kept confidential.

The Respondents and their counsel admit that the Petitioner publishes a great newspaper and performs a great public service, but newspapers, like lawyers, can become over zealous. Freedom of the press carries with it a corresponding responsibility. Respect for the Courts and granting to them some latitude of discretion in the performance of their duties is just as important as is the protection of a newspaper from liability for libel.

CONCLUSION.

The Petition for a Writ of Certiorari should be denied.

ROBERT P. HOBSON,
Kentucky Home Life Building,
Louisville 2, Kentucky.

LEO T. WOLFORD,
501 So. 2nd Street,
Louisville 2, Kentucky,
Counsel for the Respondents.